

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 NOV 23 AM 9:00

SANDRA K HARKHAM, CLERK

BY: Jacqueline Marshman

STATE OF ARIZONA,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES ARTHUR RAY,)
)
 Defendant.)
)

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW
 TRIAL DAY THIRTY-TWO
 APRIL 14, 2011
 Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

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2 FOR THE COUNTY OF YAVAPAI
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5 Plaintiff,)
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7 JAMES ARTHUR RAY,)
8 Defendant.)
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Thursday,
3 April 14, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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1 APPEARANCES OF COUNSEL:
2 For the Plaintiff:
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1 P R O C E E D I N G S
2 THE COURT: The record will show the presence
3 of the defendant, Mr. Ray, and the attorneys. I
4 think there was a request that some legal matters
5 to be discussed.
6 Counsel.
7 MS. POLK: Good morning, Your Honor.
8 THE COURT: Good morning.
9 MS. POLK: There are several issues that will
10 come up, I believe, through the cross-examination
11 of Debbie Mercer that I'd like to bring to the
12 Court's attention. And then there are some
13 additional issues that will come up in the
14 testimony of Michael and Amayra Hamilton as well as
15 Detective Ross Diskin.
16 I had filed -- the state had filed a
17 motion to preclude irrelevant evidence. And
18 specifically the Court will recall during the
19 cross-examination of Ted Mercer that counsel for
20 the defendant asked Ted Mercer about the tax status
21 of the Angel Valley Retreat Center and the tax
22 status of the Hamiltons.
23 I believe that that -- first of all, that
24 would not be an appropriate line of questioning for
25 Debbie Mercer. It's not appropriate for Ted

1 Mercer. Neither of them would have personal
2 knowledge of that. In addition, I believe that
3 that is irrelevant and should not be a topic for
4 this trial.

5 Secondly, there were questions concerning
6 the Hamiltons' religious affiliation, which I
7 believe are improper and should be precluded.

8 There were questions relating to whether or not the
9 sweat lodge had been permitted, and I believe that
10 should be precluded as not proper.

11 I did raise the issue of the bankruptcy
12 that the Hamiltons have filed, and I believe that
13 the Court has -- or that perhaps counsel for
14 defendant indicated that they would not ask
15 questions about that.

16 And then finally with respect to the
17 Hamiltons' testimony, the state had filed a motion
18 asking -- it's on the topic of the lawsuits. And
19 we discussed it last week as well. Specifically
20 the lawsuit that was filed against Angel Valley by
21 Ivan Lewis, et al., in the United States District
22 Court and has been dismissed with prejudice on
23 October 29th. And I believe that that would not be
24 a proper area of inquiry.

25 THE COURT: I have the written motion. And

1 it's a different matter really that you brought up
2 earlier, Ms. Polk, now, just disclosure of lawsuit
3 information. But are you -- you're referring to
4 another written motion?

5 I -- I know I have asked for pending
6 legal matters that need to be addressed. But I
7 want to see anything that you have in writing on
8 any of these on the subject that you've brought up
9 in these five areas right now.

10 MS. POLK: Your Honor, we filed the motion on
11 April 11.

12 THE COURT: Obviously there could have been --
13 and there is not any response at this time. That's
14 filed --

15 MR. LI: Your Honor, I --

16 THE COURT: -- this week.

17 But let's address the -- the specific
18 issues at hand on the -- on the five things
19 Ms. Polk raised.

20 MR. LI: Yes. Your Honor, with respect to the
21 tax status of Angel Valley Retreat Center, this
22 goes directly to the credibility of these
23 witnesses. They claim to be a 501(c)(3), and yet
24 they generate profits from renting out their
25 facility. And they've gotten in trouble with both

1 the county -- and we don't know what their status
2 is with respect to what taxes they pay. This is
3 directly relevant to their credibility. It's
4 pretty standard impeachment.

5 THE COURT: Impeachment on -- when you said
6 "credibility," is there a rule you're citing to me
7 that would -- would encompass this --

8 MR. LI: There are --

9 THE COURT: -- a rule of evidence?

10 MR. LI: There is. I mean, it's 6-0 --

11 MR. KELLY: Judge, I keep jumping up and down,
12 and the reason is I'm cross-examining Debbie
13 Mercer.

14 THE COURT: Okay.

15 MR. KELLY: Mr. Li is cross-examining
16 Mr. Hamilton, so we -- and both those names have
17 been --

18 THE COURT: It makes sense, though.

19 MR. KELLY: And, Your Honor --

20 THE COURT: I'll take it in the order that
21 Ms. Polk brought it -- brought it up.

22 The first thing that Ms. Polk had was tax
23 status. So let's -- let's address that.

24 MR. KELLY: Here's what I anticipate the
25 testimony from Debbie Mercer based on her interview

1 with Ross Diskin in October of 2009. She told
2 Detective Diskin that she understood that
3 Angel Valley was in a bankruptcy status, that it
4 was affecting their business -- the viability of
5 their business.

6 And I had, in fact, intended to ask
7 questions about Ms. Mercer's knowledge in regards
8 to a bankruptcy having been filed by the Hamiltons,
9 the impact perhaps on her husband's employment.
10 And, of course, it goes to the credibility and the
11 motivation of witnesses, specifically the
12 Hamiltons.

13 In regards to the religious affiliation
14 of the ministry, Judge, I -- I would point out that
15 it was the testimony of Fawn Foster during which
16 she said that she did not believe -- or her
17 testimony, and I'm summarizing, was that a sweat
18 lodge is a religious ceremony reserved for Native
19 Americans, and under any circumstance a person
20 should not charge money for that experience.

21 And I believe it's important to point out
22 to this jury that Angel Valley, through the
23 testimony of Debbie Mercer, who, I believe, has a
24 similar belief based on her interviews -- to point
25 out that Angel Valley holds itself out as a

1 ministry, a tax-exempt organization and yet charges
2 money for participants to come and stay there.

3 So as to points 2 and 3, Judge, I had
4 intended on addressing those during Ms. Mercer's
5 cross-examination. And -- and I believe it's
6 appropriate, not only to -- in regards to
7 credibility of this witness, but also for the
8 future and past witnesses as to their motivations
9 during testimony.

10 And I'm going to defer back to Mr. Li,
11 Judge, in regards to the tax status.

12 THE COURT: Tax status.

13 Mr. Li.

14 MR. LI: Your Honor, I apologize for not
15 having it right off the top of my head. But
16 608(b), you can inquire into a witness's --
17 specific instances of conduct of a witness. We're
18 not going to offer extrinsic evidence. But they
19 may in the discretion of the Court, if probative of
20 truthfulness or untruthfulness, be inquired into on
21 cross-examination.

22 THE COURT: Okay. Let me -- if we address
23 these one at a time, it's going to be easier.

24 So, Ms. Polk, with regard to tax status,
25 Mr. Li says that I should consider that under

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1 608(b).

2 MS. POLK: Your Honor, there is nothing
3 improper, first of all, with a nonprofit charging
4 for events. There is no evidence in this case that
5 the IRS or the State Department of Revenue has
6 found any problem with the tax status of the
7 Hamiltons.

8 The area of inquiry by defense is
9 intended to suggest to the jury that somehow there
10 is something improper with being a nonprofit and
11 charging for the events. And that just is simply
12 untrue.

13 If there was some evidence, some finding
14 of a wrongdoing by the IRS or the revocation of
15 that tax status by the IRS as a result of holding
16 retreats there, then perhaps that might be
17 admissible. But we are delving off into an area
18 beyond the province of the jury that is taking us
19 into an area that is simply misleading to suggest
20 to the jury that somehow a nonprofit cannot charge
21 for events.

22 THE COURT: At this point I'm not going to
23 allow it. If there is actual evidence showing that
24 there would be a basis for the question, I would
25 consider it under 608(b).

1 MR. LI: Your Honor, then -- then I'll just
2 proffer a couple opinions.

3 THE COURT: Well, and, again, I think -- go
4 ahead.

5 MR. LI: We got a pleading on -- on the 11th,
6 Your Honor. And we're obviously dealing with other
7 matters. So if the Court needs more time to deal
8 with this, we're more than willing to provide that
9 particular information to the Court.

10 But the two proffers I would make are,
11 one, one of my tax partners has done a search for
12 any tax returns filed by Angel Valley. They do not
13 file tax returns. It's my understanding that under
14 certain tax codes, you are required to pay for
15 tax -- you're required to declare and pay taxes on
16 profits that you make.

17 THE COURT: You can make the proffers. As I
18 said, I'm going to consider this. If there is --
19 if there is substantiation for those kinds of
20 questions, they could well be proper.

21 MR. LI: Thank you, Your Honor.

22 And then the second thing I would proffer
23 is that it's a -- and this is a slightly different
24 issue as to the tax status per se. But
25 Angel Valley has been going through a number of --

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1 has been cited for a number of CUP violations,
2 conditional use permit violations, relating to the
3 way they use their land and whether or not as -- as
4 the retreat center whether or not they can charge
5 for the events that are held -- you know -- and in
6 Mr. Ray's case for five days \$107,000. And this
7 has been the subject of a public hearing, public
8 records, relating to these violations of the CUP.

9 The Angel Valley folks went to city
10 council or the planning commission to try to get
11 them changed, but they were initially denied
12 because they were in violation, and then a small
13 change was allowed.

14 And I think all of that means that they
15 were operating outside of the law, doing things
16 that they were not supposed to do, which, I think,
17 goes directly to their credibility, and are
18 instances of where they have not been doing what
19 they're supposed to be doing.

20 And I think if I could just segue into
21 the permitting issue.

22 THE COURT: I'm -- I'm really trying to take
23 these up one at a time. So at this point, I'm
24 reserving on the possible admission of tax status
25 under 608. That's conceivable. At this point, I

1 want -- I want to see what's being written.

2 MR. LI: So you -- the Court would like us to
3 have a written response to this?

4 THE COURT: Yes.

5 MR. LI: And then that's what we'll do.

6 THE COURT: Okay.

7 MR. LI: But I think Mr. Kelly, however,
8 needs -- needs some direction. And perhaps I'll
9 sit down. Because he's got a witness.

10 THE COURT: Well, you're talking to -- you're
11 not -- it's just that the Hamiltons aren't --
12 aren't testifying at this time. And, again, just
13 asking people who likely don't know something about
14 something -- I have concern with that.

15 Mr. Kelly, with regard to Ms. Mercer.

16 MR. KELLY: Judge, I'm looking at my
17 cross-examination outline. And I was intending to
18 ask what appears to be three questions relating to
19 tax status, and I submit them. I was going to ask
20 her whether she knew that Angel Valley is a
21 tax-exempt organization, that that is what's
22 represented on their website, and as a result pays
23 no income tax. I just need some direction as to
24 whether or not I can answer -- ask these three
25 questions.

1 THE COURT: Ms. Polk.

2 MS. POLK: Your Honor, first of all, this
3 witness would not be the appropriate witness for
4 that issue. I understand the Court has reserved
5 the issue. But now we are talking about evidence
6 under 404(b), which is designed specifically to
7 confuse the jury and take us on -- off on a side
8 issue.

9 There has been no hearing under 404(b) to
10 suggest that this evidence about tax status and
11 some of these other issues that we are not talking
12 about are even admissible.

13 MR. KELLY: Judge, I have to reply. We're not
14 trying to confuse the jury. And, again, I submit
15 this issue. Those were the three questions on that
16 tax status I was intending to ask.

17 THE COURT: With -- with regard to -- to
18 Ms. Mercer, I -- I don't find that that would be an
19 appropriate area.

20 MR. KELLY: Your Honor, may I ask in regards
21 to the -- then I briefly summarized. But the other
22 two points were relating to the religious
23 affiliation of Angel Valley. And then the third
24 point raised by Ms. Polk was the belief that this
25 witness has that Angel Valley was in bankruptcy

1 status when she gave the interview in October of
2 '09 to Detective Diskin.

3 THE COURT: Okay. With regard to -- and I'm
4 trying to take these up as much as I can one at a
5 time. I understand there may be different
6 witnesses who testify in different areas.

7 But with regard to the issue of
8 bankruptcy filing, Ms. Polk, you're just arguing,
9 what? Irrelevant? What's your basis of why that
10 would not be a relevant inquiry?

11 Well, we have to talk about the witnesses
12 separately -- Ms. Mercer and then the Hamiltons.
13 But was there -- was there any questioning going to
14 be on that with regard to Ms. Mercer because of the
15 interview?

16 MR. KELLY: Correct, Judge. And I can --

17 THE COURT: Okay.

18 MR. KELLY: And I can summarize for the
19 benefit of Counsel and the Court. Debbie Mercer
20 tells Detective Diskin on October 19th that the
21 Hamiltons kind of backed off for a year or two, and
22 that's when we worked here. And when they came
23 back into the picture is when we said, we don't
24 want to work here anymore because they are
25 managing. They are not good business people. They

1 have a reputation of using and abusing people. You
2 know they're in bankruptcy too. They haven't had
3 to pay any of their bills for the last two years.

4 And -- and it was -- it was her state of
5 mind, the basis of that, of the knowledge to
6 provide that statement to the detective on
7 October 19, 2009, that I intended to ask.

8 THE COURT: Okay.

9 Ms. Polk, just with regard to the
10 bankruptcy. I'm only going to try to address each
11 one separately.

12 MS. POLK: Your Honor, it's not clear to me
13 what that would be relevant to -- this witness's
14 knowledge of the bankruptcy.

15 THE COURT: Underlying this case, in a
16 sense -- I don't know if "underlying" is the right
17 word. But there are all these civil suits going.
18 Financial matters are involved. And there are
19 questions of friendships and former friendships and
20 motivation.

21 And appropriate questioning about
22 bankruptcy -- it's going to be allowed. But it
23 can't be with assertions and then making assertions
24 and seeing if it's agreed with. They have to truly
25 be questions, and the person really has to have

1 knowledge. A witness can't be a vessel just to
2 have possible information introduced.

3 So with regard to bankruptcy, appropriate
4 questioning is going to be allowed as to that.
5 It's -- it's part of what is involved in the -- in
6 the whole -- the whole case.

7 MS. POLK: And, Your Honor, I understand that
8 ruling. What Mr. Kelly, then, just read to the
9 Court about Debby Mercer's opinion that the
10 Hamiltons have a reputation of using and abusing
11 people, obviously that would be inadmissible. That
12 is information relating to reputation. Who knows
13 what it's based on.

14 But I would ask the Court preclude the
15 defense from eliciting that information from
16 Ms. Mercer.

17 THE COURT: And, Mr. Kelly.

18 MR. KELLY: Judge, its purpose was, if you
19 recall the direct testimony, the State of Arizona
20 went through the witness's employment background,
21 including her husband's. And when I read this
22 transcript, what I interpreted was that as long as
23 Gary Palisch was employed as the manager, they were
24 working for Gary. When the Hamiltons became more
25 active in the management of Angel Valley, they

1 refused to work there because of this belief as --
2 as to their poor business practices and how they
3 use and abuse people.

4 So I wasn't offering this as reputation
5 evidence or the truth of the matter. It was simply
6 why the Mercers quit working for Angel Valley.

7 And, again, Judge, I'd submit it to the
8 Court for your direction.

9 THE COURT: Just on a 403 basis, what I'm
10 hearing right now, I would find that's not -- not
11 admissible.

12 MR. KELLY: Judge, the final area relates to
13 the assertion by Angel Valley that it is a church,
14 that Michael and Amayra claim to be ordained
15 ministers, and yet they charge money to individuals
16 to stay and participate in the activities in
17 Angel Valley.

18 Again, I believe this is important to
19 dispel the assertion by Fawn Foster that James Ray
20 International should not have charged money for
21 this event, including the sweat lodge, because a
22 sweat lodge is a religious ceremony. And that's
23 the sole purpose of asking those questions.

24 THE COURT: Ms. Polk, anything further on
25 that?

1 MS. POLK: Your Honor, Rule 610 of the rules
2 of evidence is clear that inquiry into the
3 religious beliefs of witnesses would be improper.
4 The -- again, a church or a -- an organization that
5 enjoys a status as a 501(c)(3) or a nonprofit,
6 whether religious or not, is permitted to charge
7 for events.

8 And, again, this is an area that is
9 confusing to the jury and is a completely
10 collateral issue and would put the state in the
11 position of then trying to -- of needing to prove
12 to the jury what the law is, that nonprofits are
13 allowed to charge for events.

14 MR. LI: Your Honor, if I may address. This
15 also sort of segues into the Hamiltons as well.
16 We're not -- I mean, 6010 (sic) is fairly specific.
17 It relates to whether or not because of the
18 witness's religious beliefs there is some sort of
19 inferences that can be drawn as to their
20 credibility. And that's not the -- nobody is
21 saying, like, because you believe in "X," you have
22 no credibility. Although I do note that there has
23 been quite a bit of discussion on the state's part
24 about what Mr. Ray believes in.

25 All we are trying to establish is that

1 they claim to be a tax-exempt church when, in fact,
2 what they do is they charge people. And if you go
3 look through -- you know -- many of their
4 statements and many other people's statements,
5 including Ms. Foster, they are actually a business.

6 And I think the Court will recall at the
7 end of Ms. Foster's testimony, Mr. Kelly was asking
8 her about -- you know -- and they would do anything
9 to save Angel Valley. And she said something to
10 the effect of, of course. They would do anything
11 that any good business person would do. They would
12 do anything to save their business.

13 And that's the point that we're making.
14 These folks are claiming to be a tax-exempt church
15 and claiming to be ordained ministers in -- in
16 something. And we don't care about the beliefs.
17 We don't want to know about their beliefs. But
18 what we do want to inquire into is -- you know --
19 their -- that they claim this and they don't pay
20 taxes. And then they -- but they make profits.

21 THE COURT: Well, so really, Ms. Polk and
22 Mr. Li, I find it's a non-610 purpose. But that
23 also means that the questioning has to be really
24 focused so that there is no implication that there
25 is an improper 610 purpose.

1 MR. LI: Absolutely.

2 MR. KELLY: I agree, Judge.

3 THE COURT: Ms. Polk.

4 MS. POLK: But, Your Honor, there is still
5 the prejudice from suggesting somehow that they're
6 doing something that the law does not allow them to
7 do. There has been no finding by the IRS or the
8 State Department of Revenue that they cannot do
9 what they do. And, in fact, they are permitted --
10 from my understanding of the law, they are
11 permitted to enjoy that tax status and charge for
12 events.

13 And that's why this is such an -- an area
14 that is so improper to go into, to pose questions
15 to a witness that are suggesting to the jury that
16 they cannot do what they are doing when they can do
17 what they are doing.

18 MR. KELLY: Judge, I'm not asking Ms. Mercer
19 any questions about the tax status. You made that
20 clear.

21 MR. LI: Just as a matter of law, I mean,
22 that's -- that's not correct. If -- if a
23 not-for-profit company makes a profit, then they
24 are -- I mean, No. 1, by definition, they are no
25 longer not for profit if they make a profit. And I

1 would submit that charging \$107,000 for five days
2 generates profits.

3 And there are -- there are -- you know --
4 we have -- I have consulted with my tax partners
5 back at the -- back at the firm. And they aren't
6 declaring it. And so the idea that well -- you
7 know -- the IRS hasn't found that it's illegal yet
8 is not the dispositive factor.

9 THE COURT: And, Ms. Polk, you have raised
10 610. And I thought that's what your concern was at
11 that point. And now -- and I certainly agree with
12 that. And it appears to me this is similar to the
13 tax-status issue. If there is real backing -- but
14 I don't want to -- I don't want to have side
15 trials.

16 I don't want to open up areas that have
17 marginal significance, relevance, really
18 collateral. And I -- certainly, not with witnesses
19 or witnesses who are just very unlikely to know
20 anything about it.

21 But with regard to the Hamiltons, if it's
22 in the same category, if there is really some clear
23 basis where there's a 608 argument, I haven't seen
24 it yet. But if there is, I'm satisfied that it's
25 not somehow a 610 purpose where there is going to

1 be some implication that the religious belief is
2 more or less --

3 MR. LI: Your Honor --

4 THE COURT: -- you know --

5 MR. LI: -- in terms of what I could provide
6 the Court in writing, just so I'm sure I address
7 the right question, it seems to me that the
8 question would be that we have searched -- I forgot
9 the name of the database. I think it's, like, Gold
10 Star or something like that -- for Angel Valley tax
11 returns. They have not filed any. And then they
12 are listed as a church, which exempts them from
13 filing what are called "990 forms" with the IRS.

14 And then, secondly, some law to the -- to
15 the point that if you have a leveraged piece of --
16 I mean, I -- I've -- we've done a significant
17 analysis on this. If you have a leveraged piece of
18 property, that is, a property subject to debt, and
19 you charge rent on that piece of property, then you
20 may be liable for taxes. You must declare taxes on
21 it.

22 So if that's -- if the Court is looking
23 for that sort of just that that's the law and that
24 they haven't done it, then we can provide that.

25 THE COURT: If there is some appropriate prove

1 up for 608 purposes, I just haven't seen it at this
2 point. So it's not going to be admitted at this
3 point. But if you want to address it and you can
4 show appropriate -- appropriate prove up so that I
5 can analyze that other than in a brief pretrial
6 context, it may be done. But at this point it will
7 not be a subject of inquiry.

8 MR. LI: May I address the issue of the
9 permits?

10 THE COURT: Yes. That hasn't been yet.

11 MR. LI: Okay. So with respect to the
12 permits, it's directly relevant, I mean, even more
13 relevant in light of the Haddow report.

14 THE COURT: And I agree. I want to hear
15 Ms. Polk address that because -- in light of the
16 information that's now available.

17 Ms. Polk, do you have anything else to
18 say about whether or not permitting would be
19 appropriate evidence as to permitting?

20 MS. POLK: Judge, I think we need to know,
21 first of all, what permits the defense is talking
22 about. There has been no disclosure of this issue
23 to us. I've reviewed the file through planning and
24 zoning, and that has been disclosed to the defense.
25 I see no finding of any violation.

1 I am familiar with the process, as
2 probably other people in this courtroom are. The
3 process where a business goes in front of the
4 board, ultimately before the board of supervisors,
5 to be permitted, works with the planning and zoning
6 department to come into compliance, to meet the
7 guidelines that are set out in the code to allow
8 them to erect a structure or run a business on a
9 piece of property.

10 That's what my review of the file
11 pertaining to Angel Valley shows is from the time
12 that they bought that property, working with the
13 county planning and zoning department, and then
14 going in front of the board of supervisors when
15 necessary to get necessary permits. I see no
16 evidence of any violation -- of ever being found in
17 violation. And the defense certainly has not
18 disclosed that to us. So, again, that's the bigger
19 picture of Angel Valley and the issue of permits.

20 On the issue of the sweat lodge itself,
21 it was not permitted. It is not clear to me -- I
22 looked at the code trying to decide for myself
23 whether or not it should have been permitted. I
24 believe there is an argument that it should have
25 been permitted. But planning and zoning never

1 found that they were in violation for not having it
2 permitted.

3 And so what the Hamiltons would testify
4 to is that planning and zoning inspectors had been
5 out at their property on numerous occasions in the
6 process of permitting other structures out there,
7 saw the frame for the sweat lodge in place, never
8 told them that it needed to be permitted.

9 So the file is absent, to my knowledge,
10 of any violation. And if the defense has a
11 violation, then I would request it be disclosed.

12 And, again, we're getting into another
13 area of the law with attorneys trying to tell the
14 jury what they believe the law should be. The
15 bottom line is this would be 404(b) evidence. I
16 would ask that there be a hearing on any permit
17 issue where we can examine the evidence, and the
18 Court can make that finding of clear and convincing
19 evidence before this evidence be offered to the
20 jury.

21 THE COURT: Okay. Ms. Polk, the structure
22 itself has been the topic of the case throughout.
23 But in light of the disclosure in the past week
24 that the state provided, if there is -- if the
25 defense has evidence as to that structure, it's --

1 it's going to in all likelihood be allowed.

2 MS. POLK: Which I understand, Your Honor.
3 But there is no evidence that it was not permitted.
4 There is no evidence that planning and zoning ever
5 went out and said, you have to have it permitted.

6 THE COURT: Well, I --

7 MS. POLK: It was not permitted. But it is
8 not clear -- what is clear is that planning and
9 zoning never told them that it had to be permitted.
10 And it is clear that they have never been found in
11 violation for not having it permitted.

12 THE COURT: Mr. Kelly.

13 MR. KELLY: And, Judge, here's the problem:
14 I've -- I've built many structures in Yavapai
15 County of varying types. And I know that it's
16 necessary to go to the county and obtain a permit
17 in order to allow construction.

18 And here's the relevant inquiry in
19 regards to this case: Once the permit is
20 obtained -- and I would agree with Ms. Polk. No
21 permit was pulled by the Hamiltons in regards to
22 the sweat lodge structure. I would agree with
23 that. I would -- I believe our preliminary
24 investigation indicates that a permit was
25 necessary. And I believe later on, a year -- 12,

1 14 months later, they actually received a permit.
2 But I don't want to mislead the Court.

3 But there was no permit. They did not
4 make an application for a permit. Had they
5 obtained a permit, then it's our understanding that
6 an inspection would have taken place before the
7 county authorized the use of the sweat lodge.

8 And it is at that point when an inspector
9 arrives that Mr. Haddow's report is so critical.
10 Because it's the actual construction of the -- and
11 we have here -- Mr. Li just showed me that Mr. Judd
12 from Yavapai County said, no inspection of the
13 structure was conducted before it was dismantled,
14 implying, in fact, that an inspection, not just the
15 permit, but someone on the ground saying things
16 such as, hey. That structure is not high enough.
17 You've not allowed adequate ventilation. Your kiva
18 is not in the center, whatever an inspector might
19 say in regards to the deficient -- deficient
20 structure which fits into Mr. Haddow's report.

21 The reason I point that out, Judge, is --
22 and I realize the jury is waiting. But --

23 THE COURT: No, they're not. They'll arrive
24 at 9:15.

25 MR. KELLY: Okay. We believe that it's

1 necessary given your ruling yesterday, which we
2 fully understand. We believe that we've been left
3 in a position today of requesting a continuance of
4 the trial for a brief time period to allow at a
5 minimum an interview of Mr. Haddow.

6 And I'm going to allow Mr. Li to address
7 the motion he's prepared for the Court this
8 morning -- an interview of Mr. Haddow in regards to
9 information relating to the email that was
10 discussed yesterday, an interview of Mr. Diskin in
11 regards to that issue.

12 And what Ms. Polk brings up this morning,
13 an inquiry into this permitting and inspection
14 process to make an adequate determination as to
15 whether or not this sweat lodge, the one that
16 existed in October of 2009, failed in some regard
17 in terms of its construction.

18 And here's my difficulty as the attorney
19 who is going to cross-examine Debbie Mercer. If
20 you recall the testimony of both she and her
21 husband, they're the very individuals who
22 constructed the sweat lodge. I would make this
23 offer of proof: That based on her interview with
24 Detective Diskin back in October of 2009, she
25 represented to the detective that she has never

1 built a sweat lodge before this sweat lodge, that
2 she received instructions via an email from the
3 Hamiltons with specific instructions on how to
4 build it, that she conducted independent research
5 by Googling "sweat lodge" on the Internet, and then
6 she built this sweat lodge.

7 Mr. Haddow's report now has suddenly
8 become extremely relevant for purposes of
9 cross-examination because I don't know the best
10 questions to ask her on cross-examination in
11 regards to providing due process for my client. I
12 don't know whether to ask her, as I stand here this
13 morning, were you aware that a heat barrier existed
14 due to your construction of the sweat lodge? Were
15 you aware that due to the offset center of the
16 kiva, there may have been enhanced carbon dioxide
17 buildup?

18 And the reason I don't know whether or
19 not to ask her that question this morning is
20 because we have not completed the investigation as
21 it relates to Mr. Haddow. And, of course, we just
22 found out about it last week.

23 So there is kind of a lengthy response to
24 the permitting. But I -- but I believe it's much
25 more involved than simply precluding us from asking

1 questions about whether this structure was
2 permitted.

3 It's a much more involved inquiry. And I
4 take issue with the state. This is important
5 evidence for this jury to consider. It's not
6 confusing. It's relatively simple, and it's -- and
7 it's material to the outcome of this case.

8 THE COURT: We're dealing with a couple of
9 different things. You've got to look at exactly
10 what's at issue. As Ms. Polk mentioned, to have a
11 witness agree on what the law is or not, it's not
12 appropriate. I think it's appropriate to ask if
13 they do know, if they have an understanding, and it
14 bears on it. That's an appropriate question. But
15 to assert what the law is through a witness who
16 doesn't know is just not appropriate at all.

17 But, again, if they do have the knowledge
18 and it -- and it guided the conduct in some fashion
19 that's relevant, then it is pertinent.

20 So I think that really clears up --
21 clears up that. If the person doesn't know, you
22 can't bring in a version of the law by saying,
23 isn't it true that the law requires this? You
24 know. You just -- you just have to look at the
25 context each time.

1 Then, Mr. Kelly, you bring up now that
2 you believe that the construction was managed by
3 this process you described.

4 MR. KELLY: Judge, again, I believe that that
5 is a somewhat accurate summary of the interviews
6 conducted by Detective Diskin, that Ted and Debbie
7 Mercer were solely responsible for the
8 construction. They received their direction from
9 the Hamiltons, that she conducted independent
10 research on the Internet, which confirmed what she
11 was told with -- by the Hamiltons.

12 They were told to do things such as make
13 an airtight seal. And, of course, coupled with
14 that very important line of questioning is that JRI
15 had nothing to do with the construction, which then
16 brings us back to Haddow. And you've read the
17 report that he describes the construction as a
18 contributing factor. And, of course, I've
19 summarized that.

20 And that -- again, Judge, we understand
21 your ruling. But we're placed in the most
22 difficult position of attempting to conduct
23 cross-examination without having ever interviewed
24 Mr. Haddow and without having interviewed
25 Detective Diskin as it relates to his conversations

1 with Mr. Haddow. Nothing -- nothing greater than
2 that.

3 So we are requesting a brief continuance
4 of this trial to allow those interviews to take
5 place. And Mr. Li has a motion related to that
6 which addresses the preservation of evidence that
7 may exist in regards to this issue.

8 THE COURT: Mr. Li.

9 MR. LI: Your Honor, we filed it below. But
10 if the Court wants --

11 THE COURT: I would -- if you have it, I'd
12 like to see it.

13 MR. LI: Here's a courtesy copy. We've also
14 served the state with a courtesy copy, unconformed
15 (sic) and on file.

16 MS. POLK: And, Your Honor, on the issue of
17 the permits, I'd like to be heard.

18 THE COURT: It's gone so much beyond the issue
19 of the permit itself, Ms. Polk, and --

20 MS. POLK: If I can just make two points,
21 Your Honor. One is that there is no building code
22 on how to construct a sweat lodge. So the
23 suggestion somehow that if it had been permitted,
24 then there would have been certain requirements to
25 build a sweat lodge, that just doesn't exist in the

1 Yavapai County Building Code, how to build a sweat
2 lodge.

3 Secondly, the evidence in this case
4 through the testimony of the Hamiltons will be that
5 Mr. Ray was unhappy because the sweat lodge in the
6 earlier years did not get hot enough. And so in
7 response to his demands that they make a sweat
8 lodge that was hotter, they built the big brown
9 covering that ultimately is put on the sweat lodge,
10 and then subsequent ceremonies are conducted in it.

11 So the evidence will be that it was
12 Mr. Ray who wants it to be hotter and hotter. And
13 in order to achieve that, then they strive toward
14 making it airtight so that the air will stay
15 hotter.

16 Finally, on the issue of the permit, we
17 have no discovery from the defense what permit it
18 is that they think was supposed to be in place and
19 what the evidence would be through the witnesses
20 that that permit was required. Is there some
21 information from planning and zoning?

22 I have looked at the code. It appears to
23 me that a structure like that should be permitted.
24 But it is not clear. It is not black and white.
25 And what we know, what the evidence in the case

1 will be, is that it is not permitted, that the
2 inspectors who go out to the property on a regular
3 basis to permit other structures see the frame in
4 place and never comment, never suggest to the
5 Hamiltons that they have to get it permitted.

6 And let me just -- it appears to me a
7 structure of that size has to be permitted. What's
8 not clear to me that when it's just temporary, when
9 what you're just leaving up is a frame and then
10 covering it for a few hours or a few days, that in
11 that event that it has to be permitted. It's just
12 not clear to me, Your Honor.

13 THE COURT: Mr. Kelly explained a theory of
14 relevance that I -- that appears to me to be -- to
15 be viable. It adds a factor into the aspect of
16 knowledge, legal causation. And arguably, I'm not
17 taking a position on the evidence at all, Ms. Polk,
18 as to ultimately where it comes out.

19 The defense -- and what's really before
20 the Court right now -- it seems to me we took this
21 out of order really and how -- what we should have
22 been addressing is I heard kind of offhand a
23 request to continue the trial, which is not just a
24 light thing to request, Mr. Kelly, in --

25 MR. KELLY: Your Honor, I didn't mean for it

1 to sound offhand.

2 THE COURT: Well, it just -- it came up after
3 we were discussing basis evidentiary issues to take
4 care of witnesses. And then, in fact, we're doing
5 that when this issue apparently was the one that
6 was going to be asserted and I would have liked to
7 have been discussing at 8:30. But in any event --

8 MR. KELLY: For that, Judge, I apologize. I
9 was attempting to be considerate to the state in
10 their evidentiary issues. But we are definitely
11 making a motion to continue the trial based on the
12 Court's ruling yesterday. I believe that a
13 discussion with the state needs to take place
14 relating to the availability of witnesses before we
15 can provide you an honest assessment as to how long
16 the continuance should be, whether it be several
17 days or up to perhaps 10 days or two weeks.

18 We just believe it's absolutely
19 necessary. And I'll just provide this as an
20 example. I've had a client, Rocky Crumpholts, whom
21 we know, who had a yurt in Walker, Arizona, and as
22 recently as two to three years ago was asked to
23 dismantle it because he didn't have a permit. I
24 was quite surprised.

25 But I did some -- and I don't pretend to

1 be a planning and zoning attorney. But it brings
2 out -- it just points out after what Ms. Polk
3 said -- and I believe what she's telling the
4 true -- the Court is true in regards to her
5 understanding as to what's required in regards to
6 permitting with Yavapai County.

7 But it points out the necessity of the
8 continuance, because we need to go ask the
9 pertinent questions. And the most pertinent
10 question is, had you issued a permit, would you
11 have required an inspection? If the answer to that
12 question is yes, what would have been looked at
13 during the inspection? And we don't know that
14 answer this morning.

15 In addition, and more importantly, then,
16 it does evolve into Mr. Haddow's report. And,
17 again, the request is to preserve that evidence, to
18 conduct an interview of Mr. Haddow and
19 Detective Diskin before we continue with the trial.

20 And the purpose of that, Judge, is simply
21 to allow us to adequately present our case, our
22 cross-examination, and represent our client.

23 THE COURT: And the witness on the stand now,
24 of course, Ms. Mercer.

25 But, Ms. Polk, were you contemplating

1 calling the Hamiltons next?

2 MS. POLK: Yes, Your Honor.

3 MR. KELLY: Judge, I should mention that.

4 I believe we're going to have to recall Ted Mercer.
5 I don't like this idea of fractured testimony,
6 whether it be in the form of direct or
7 cross-examination. And I don't think it's fair to
8 the defense to put Ms. Mercer on in all aspects
9 except the construction of the sweat lodge and call
10 her back at some later date, as we're probably
11 going to have to do with Mr. Mercer.

12 But then as soon as she's finished, we're
13 confronted with the identical issue when the
14 Hamiltons testify. So now would be the time for a
15 continuance. And, again, in regards to the length
16 of time, I believe consulting with the state would
17 be appropriate before we made a specific request.

18 THE COURT: Ms. Polk, I would like to hear
19 what you have to say about the request to continue
20 the case, for this week anyway.

21 MR. HUGHES: Your Honor, if I can respond.
22 With respect to the request to continue, the state
23 does oppose the continuance. The -- there is no
24 indication how long that continuance would be. The
25 Court made its ruling early yesterday. At least as

1 far as 1:30 or 2:00 o'clock, I think, is when the
2 email came out from the Court's judicial assistant.

3 The defense could have requested and we
4 would have tried to set up an interview with
5 Mr. Haddow yesterday afternoon. I don't know if
6 that would have been possible or not. But we
7 certainly would have tried to get one set up with
8 Mr. Haddow. We can continue to try to get one set
9 up. I can find out if he'd be available even
10 today, maybe during the lunch hour, to do an
11 interview.

12 But to take a continuance, we've lost,
13 including the dates of the juror's illness, three
14 days now. The permit issue in and of itself is not
15 a new issue. The issue of the construction and who
16 constructed the sweat lodge is not a new issue.
17 Ms. Mercer's knowledge of how she constructed the
18 sweat lodge is something she already has talked
19 about somewhat on the stand and would be available
20 for cross-examination.

21 So I just don't see how the interview of
22 Mr. Haddow would need to precede Ms. Mercer's
23 cross-examination. Because, again, she's going to
24 be talking about what she knows as far as this is
25 how we constructed the sweat lodge. This is the

1 tarps that I put on or whatever it is that she
2 knows.

3 With respect to anything new that might
4 come up from an interview with Mr. Haddow, we can
5 always recall Ms. Mercer. We can keep her subject
6 to recall. So to lose yet another day or more, it
7 seems like an unnecessary delay in this case.

8 THE COURT: Anything else, Mr. Kelly?

9 MR. KELLY: Judge, I would just state the
10 obvious. Apparently the government's agreeing that
11 an interview of Mr. Haddow is necessary. I cannot
12 prepare a cross-examination of Ms. Mercer unless I
13 know what Mr. Haddow is saying in regards to the
14 construction.

15 And finally, Judge, these brief
16 telephonic interviews of Mr. Haddow's report, which
17 you've read, contains exculpatory evidence. We
18 would want to conduct that in person so we can meet
19 him, speak with him, assess his presence that he'll
20 exhibit in front of the jury. And we can't do that
21 by telephone.

22 And, again, of course, we're also
23 requesting the interview of Detective Diskin, the
24 reinterview as it relates to this narrow topic, as
25 well as signing the order that's in front of the

1 Court.

2 The only reason I suggested a meeting
3 with the Court -- with the state to determine the
4 time length was for the convenience of the Court.
5 Now I'm being criticized for not specifying the
6 time. I'll say a time. I believe we need to take
7 a recess this week and all of next week to
8 accomplish this, and begin the trial -- I guess
9 that would be a week from next Tuesday if you want
10 a definite time.

11 And one thing that Mr. Hughes has omitted
12 is that in order to properly interview an expert
13 such as Mr. Haddow, an environmental engineer, that
14 takes some time to prepare for that interview. So
15 we're not willing to do it by telephone at noon
16 today.

17 THE COURT: Both sides have received my more
18 detailed ruling, haven't you, that I issued? In
19 fact, it was a little after 5:00.

20 MR. LI: Yes, Your Honor.

21 THE COURT: Ms. Polk and Mr. Hughes, do you
22 have that?

23 MS. POLK: Yes.

24 MR. HUGHES: Yes.

25 THE COURT: One thing I mentioned in there is

1 that the defense through cross-examination can
2 handle the information that's been provided. Well,
3 part of being able to handle it is being given
4 sufficient time to -- to prepare and consider the
5 information which -- and I look at the
6 circumstances, and I have a concern that, as I
7 recall from the briefing, it was disclosed with
8 other information on April 4 without any particular
9 flagging or anything.

10 Is that correct, Mr. Hughes?

11 MR. HUGHES: Your Honor, I believe it was in
12 a -- it came out in a disclosure statement in
13 response to a request from the defense. And there,
14 I think, were a number of other -- I don't know how
15 many others. I don't think it was a tremendously
16 large amount of other information. But if I
17 recall, there was some other information in --

18 MR. LI: Your Honor, I can address that issue.
19 It was parked in a CD among probably 50 some-odd
20 other pages. Normally the procedure has been when
21 it's something as small as 50 pages, they can just
22 hand us the 50 pages. But my understanding is that
23 it was in a CD that we didn't even have a chance to
24 look at until the -- the evening.

25 THE COURT: I thought Mr. Hughes was

1 suggesting, though, that it might have actually
2 been itemized so that it was apparent from looking
3 at the document.

4 MR. HUGHES: Your Honor, and I'm told that the
5 other information was the lawsuits involving the
6 Hamiltons, which had also been subject of a
7 request.

8 THE COURT: I didn't bring those documents out
9 this time.

10 MR. LI: And I'm sure there was a list.
11 Because every time they do another disclosure,
12 there is a list of all the things that are being
13 disclosed. And then there is the actual CD of that
14 information.

15 THE COURT: I would really like to see that
16 since we're talking about it --

17 MR. LI: Sure.

18 THE COURT: Because if that had come to the
19 attention of the Court beforehand, at least it
20 would have been dealt with before there would have
21 been witnesses testifying who have knowledge that
22 relates to the disclosure. And we actually went
23 through a whole week of trial before that came to
24 light.

25 MR. LI: Your Honor --

1 THE COURT: And I -- and I want to see how it
2 was actually.

3 MR. LI: We're getting a copy right now. But
4 just so the Court knows -- you know -- this is the
5 50th disclosure that the state has given us. And
6 we continually get them -- you know -- every few
7 days or so or perhaps every week.

8 And so we looked at it. And -- you
9 know -- we are in the middle of trial, and we
10 looked at it as quickly as we could. And the
11 moment we realized what we had in there, we filed
12 our motion. We did not sit on it.

13 THE COURT: I'm trying to just sort out
14 exactly how it was presented, how it came up, and
15 consider time issues.

16 MR. LI: Your Honor, while we're waiting, I
17 think there is probably a couple of other issues
18 that we can probably submit to this Court in
19 writing. But we believe that the state -- this
20 Court's finding that the state violated the
21 due-process clause of the Constitution entitles the
22 defense to several jury instructions.

23 And the fact that this Court found that
24 the state suppressed certain pieces of evidence for
25 11 months, to the detriment of the defense, in a --

1 in a manner that was material has created a delay
2 in the trial and has prejudiced the defense. And
3 we think that we are entitled to some jury
4 instructions in this regard.

5 We can submit those jury instructions to
6 you, and the Court can look at them. But I think
7 that's fairly standard that when there has been a
8 willful nondisclosure, a suppression of evidence,
9 that there are instructions that accompany that.

10 This court has made a ruling. We
11 obviously have our position on the ruling, and
12 respect what the Court said and understand that.
13 But -- you know -- we're reserving our various
14 objections.

15 But this Court's ruling was very strong.
16 And it has statements in there that have found that
17 the state has committed a constitutional violation.
18 And under those circumstances the defense is
19 entitled to instructions in that regard.

20 There are many, many other circumstances
21 under which the defense is entitled to similar
22 instructions. And we would request such an
23 instruction, and we'll provide it in writing. I
24 actually have a copy right here, three separate
25 instructions.

1 THE COURT: Ms. Polk, when somebody says
2 something, if you want to respond, I think you need
3 to be given an opportunity, if you wish, at this
4 point. But I'm not going to decide an issue like
5 that. There's other things that have to be decided
6 this morning.

7 MS. POLK: And, Your Honor, just to respond on
8 the issue of jury instructions, that, of course, is
9 a topic for another day and when we all have the
10 opportunity to review and do appropriate research.

11 But on this issue of a constitutional
12 violation, I just want to point out that, as we
13 argued yesterday, we have made over 8,000 pages of
14 disclosure in this case. Mr. Li just talked about
15 or 50th supplemental, which is true. Every time
16 information comes to us, we do our best to get it
17 disclosed.

18 That an email from a long time ago got
19 lost was regrettable. And the state came in here
20 and took responsibility. What we did, though, when
21 we found that email was the ethical thing. We
22 produced it for the defense and brought the
23 issue -- or addressed the issue in front of the
24 Court. We didn't shred it. We didn't burn it. We
25 didn't hide it. When we became aware that there

1 was that email, we did the ethical thing, which was
2 bring it forward and give it to the defense.

3 This issue of jury instructions is a
4 topic for the another day.

5 MR. LI: Well, in particular -- I apologize,
6 Your Honor.

7 THE COURT: Yes, I will. And we can reserve
8 that. We're not getting the -- the information.

9 I really have enough to make the decision
10 now in terms of the continuance. I am going to
11 postpone the trial through this week. And I'm
12 going to restart the trial next Wednesday. I'm
13 going to bring the jury in and tell them. And I
14 expect both sides to work in good faith so that the
15 trial will continue next Wednesday.

16 MR. LI: Your Honor, what would be helpful,
17 then, if we could have the Court review the order
18 that we've asked, which has -- requests certain
19 documents relating to the Haddow report, relating
20 to communications between the sheriffs and
21 Mr. Haddow and the county attorney's office and
22 Mr. Haddow.

23 We had several representations yesterday
24 about how many communications there have been. And
25 so we think it's important that the evidence be --

1 you know -- provided to us in reserve so that we
2 can explore that.

3 Because one of the issues, as the Court's
4 opinion lays out, is what are the circumstances
5 under which this particular report was provided or
6 not provided.

7 THE COURT: And Ms. Seifter brought the
8 document I think I wanted to see. If I could --

9 MR. HUGHES: And, Your Honor, we've been able
10 to pull up a copy too. The Haddow information is
11 mentioned on page 3. And it's itemized at Bates
12 numbers 8060 through 8065. And it indicated that
13 that included a background information for Rick
14 Haddow as item Q; Preliminary Investigation Outline
15 prepared by Rick Haddow, item R; and Haddow
16 environmental service -- or Environmental Research
17 Organization Professional Services and Retainer
18 Agreement, as item S.

19 THE COURT: Could I have the document?

20 MR. LI: Perhaps Ms. Seifter can explain some
21 of the contents.

22 MS. SEIFTER: Judge --

23 THE COURT: It would help if I could see it.

24 But go ahead, Ms. Seifter, if you wish.

25 MS. SEIFTER: Okay. Your Honor, the very

1 brief explanation is the state's usual practice is,
2 as I think they have just explained, email us both
3 the list of documents and the actual documents,
4 which enables us to view them immediately.

5 In this case I'll provide the email that
6 we received along with it. But due to the volume
7 of the documents, they're not attached to this
8 email but were burned to a CD and delivered to
9 Mr. Kelly's office, which is true.

10 And the issue is just that it took us --
11 you know -- a day after that to go get the CD and
12 upload the documents and review them. And that was
13 the delay of a few days before we were able to
14 actually review the document and understand its
15 import.

16 THE COURT: If I may see that, please.

17 Thank you.

18 MS. SEIFTER: And, Your Honor, just one more.
19 In addition to that, there was -- there was not a
20 letter sort of with it responding to Ms. Do's
21 disclosure request and noting that the state -- you
22 know -- this was the response to her letter.

23 THE COURT: But this you received, and it was
24 printed off, and you had this on the 4th?

25 MS. SEIFTER: That's correct.

1 MS. POLK: And, Your Honor, if the state could
2 know what was handed to the Court.

3 THE COURT: Oh. I'm sorry. I thought you
4 were coordinating on this.

5 MS. POLK: Well, is it the disclosure
6 statement itself? Or what is it?

7 MR. LI: It's an email.

8 THE COURT: It's the 50th supplemental
9 disclosure by the state.

10 MS. POLK: Thank you.

11 THE COURT: And there was a -- and then there
12 is a cover email with it.

13 MS. POLK: Thank you.

14 THE COURT: And Mr. Hughes informed me that it
15 was on page 3. And it seems on the 5th this would
16 have all been before the Court.

17 MR. LI: Well --

18 THE COURT: But I'm not -- I'm not saying
19 anything. I've granted the request to continue for
20 today and two other -- and what amounts to two
21 other trial days to do that.

22 Mr. Hughes.

23 MR. HUGHES: Your Honor, with respect --
24 Mr. Li's mentioned a proposed order. He provided
25 us an unsigned copy of what he said would be filed

1 as a motion. We don't have an order that was
2 attached to that. But I presume the order would
3 track the language in the motion itself.

4 With respect to that, certainly the state
5 has no objection to communications with Mr. Haddow.
6 The -- Item No. 3 in the motion, which is on
7 page 2, says, any and all reports, including drafts
8 or preliminary reports, statements, or examination
9 notes made by Mr. Haddow.

10 We don't have those in our possession.
11 We will do what we can to get those from
12 Mr. Haddow. But he has not been retained by us, so
13 I don't know if we can fully comply with that to
14 the extent that he would be willing or unwilling to
15 provide that.

16 With respect to the final items, which
17 would be interviews of Detective Diskin, interviews
18 of the county attorney, and interviews of myself, I
19 think those -- I see no reason for those. They
20 would be simply to harass Ms. Polk.

21 THE COURT: Mr. Hughes, here's what I want to
22 do. I don't want to inconvenience the jury
23 anymore. I want to excuse them. And then I want
24 the parties to discuss this, make sure I have the
25 documents. And then we can get back on the record

1 for legal purposes a bit later. Let's just not
2 argue and present positions at this point.

3 So I'm just going to stay here.

4 If we can get the jury.

5 (Proceedings continued in the presence of
6 jury.)

7 THE COURT: Ladies and gentlemen, I'm
8 going to announce that there is going to be a
9 postponement of the trial. It's going to be
10 postponed until next week. It's going to resume on
11 April 20th, next Wednesday, at 9:15. When these
12 things happen, and as I say at the start in the
13 preliminary instructions, it's not anybody's fault.
14 It just happens sometimes.

15 But it's particularly important -- you
16 know -- I hesitate to say particularly because the
17 admonition is important always. But when there is
18 a long period of time and you're away from my
19 reminding you, there is a concern that -- that you
20 stay focused on how important following that
21 admonition really is.

22 So you just have to follow it in all
23 respects -- not be attempting to do any
24 investigation; avoiding any media exposure;
25 avoiding any kind of discussion in any way with

1 anybody; making sure that, as you have in the past,
2 if any incidental thing happens, you let me know
3 through a note.

4 So because of this long break and the
5 fact that I won't be able to remind you, I'm going
6 to stress, please follow the admonition in all
7 respects. And I certainly will do everything I can
8 to avoid inconveniencing you.

9 Everyone here appreciates all the time
10 and the attention, how diligently you have served
11 in this case to date.

12 And I will try to prevent you coming into
13 court if -- if that can be done by having you check
14 in with the jury commissioner, having the jury
15 commissioner contact you. But stay in -- stay in
16 contact. I think the procedure is if you check
17 after 5:00 o'clock in the evening, it gives you
18 instructions. But don't -- don't wait for that. I
19 want everybody to stay in touch and -- and make
20 sure that this is the schedule.

21 But this is the schedule now. Trial will
22 resume next Wednesday. That's April 20th, at 9:15.

23 And just before I excuse the jury for
24 this rather prolonged recess, Counsel, did you need
25 to take anything up?

1 MR. HUGHES: No, Your Honor.

2 MR. KELLY: No. Thank you, Judge.

3 THE COURT: Okay.

4 Thank you, ladies and gentlemen. Again,
5 take care. Again, your -- your efforts and time
6 are very much appreciated. And I'll see you next
7 week.

8 (Proceedings continued outside presence
9 of jury.)

10 THE COURT: Counsel, I would like to have a
11 recess now. But what I want you to do is make sure
12 that everybody has the -- what has been filed. And
13 we can address these matters that will relate to
14 anticipated discovery over the next few days.

15 Thank you.

16 (Recess.)

17 THE COURT: The record will show the presence
18 of Mr. Ray and the attorneys.

19 I had hoped that perhaps there could be
20 some agreements on some things, and that might
21 minimize the argument necessary.

22 Counsel, either side.

23 MR. LI: I'll just articulate what I
24 understand the agreement to be and what I
25 understand to be the sort of outstanding issues.

1 And obviously the county attorney can correct me.

2 Yeah. I think there is a general
3 agreement on Item No. 1, Your Honor. You've got --
4 THE COURT: Okay.

5 MR. LI: There is a general agreement that the
6 county attorney's office will provide
7 communications with Mr. Haddow, including without
8 limitations emails and written correspondence.

9 There is a disagreement. We have asked
10 for, in addition, notes of the county attorney's
11 office, which would replace -- which would reflect
12 the date and substance of their conversations. It
13 appears that there have been additional
14 conversations along the lines of what Mr. Hughes
15 discussed and -- yesterday.

16 So -- at least -- I don't know how many
17 more communications. But there appear to be more
18 communications than were discussed in the filing
19 that the Court received on, I believe, Tuesday from
20 the state.

21 THE COURT: And, Mr. Li, if we could address
22 these item by item.

23 MR. LI: Yes.

24 THE COURT: So if you have more to say on
25 that, go ahead. But I want the --

1 MR. LI: Then I'm going to move down.

2 THE COURT: Okay.

3 Then, Mr. Hughes, I guess.

4 Or Ms. Polk.

5 MS. POLK: Your Honor, are we on No. 1 or
6 No. 2?

7 THE COURT: On No. 1, first of all.

8 MS. POLK: And what the -- what the parties
9 had talked about was that -- obviously, as we
10 disclosed to the state, we had a conversation,
11 perhaps more than one conversation, with Rick
12 Haddow, had noticed him as a witness in the case,
13 had -- or scratch that -- correct that. We had
14 disclosed him -- his CV to the defense last October
15 and then ultimately made the decision to withdraw.

16 And so just to clear up the record, the
17 state has never presented to the Court that the
18 only communication we had from Rick Haddow was the
19 email. We clearly communicated and clearly had a
20 discussion with Rick Haddow. And that's why we,
21 then, disclosed him and the CD as an expert and
22 planned that he would do a report. Having made the
23 decision later not to call him, we had let that
24 matter drop.

25 The issue with the parties is we have

1 agreed to look through our records for any other
2 written communication. We believe we have
3 disclosed everything in good faith. The defense
4 has asked for prosecutors' notes from the meetings
5 with Mr. Haddow. And Mr. Hughes believes he took
6 no notes. I believe I took notes because I always
7 take notes. And I'll check to make sure.

8 But I'm fairly confident I've got notes.
9 And the defense has requested my notes. I'm
10 looking at the Court order from December 1st. And
11 that's when the state had sought a protective order
12 from the Court for the prosecutors' notes of our
13 meetings with experts.

14 And looking at the language of the court
15 order on page 3 where the Court noted that the
16 rules do not require the state and the defendant to
17 provide disclosure of statements in the form of
18 attorney notes or otherwise of expert witnesses
19 retained by the parties; rather, the parties are
20 required to disclose results of examinations,
21 tests, experiments, or comparisons made by the
22 expert. In some cases information may be contained
23 in attorneys' notes or other statements by the
24 expert. And in those cases a party may choose to
25 disclose the required information by providing

1 notes and statements.

2 And what I'll do, Your Honor, is locate
3 my notes, examine them. And if they have
4 information not in that outline that we have
5 disclosed, then I will make disclosure of them.

6 THE COURT: Mr. Li.

7 MR. LI: Provided that we -- I mean, one of
8 the main things that we're also interested in is
9 generally the dates of the -- the dates of the
10 contacts with the particular experts. So if, for
11 instance, Ms. Polk finds a note where she believes
12 that the actual content of the note doesn't -- you
13 know -- comply with the Court's rulings but there
14 is some notation that on this particular day I
15 spoke to Mr. Haddow, we would want that as well.

16 But obviously we would want anything that
17 contains a statement made by Mr. Haddow relating to
18 what his findings were -- you know -- and conveyed
19 to Ms. Polk or to Mr. Hughes or to anybody at the
20 county attorney's office relating to the substance
21 of his opinions after reviewing the evidence.

22 THE COURT: That was a very involved issue
23 when we dealt with it before.

24 MR. LI: I think we generally have an
25 agreement.

1 THE COURT: Okay.

2 MR. LI: I mean, to the extent that there
3 are -- I think that the state has just represented
4 that they will -- she will go -- Ms. Polk will go
5 through her files, find the notes, see if there are
6 notes that reflect statements by Mr. Haddow, and if
7 they do, turn them over.

8 If they don't, the only thing I'm
9 requesting is even if they don't reflect opinions
10 or statements of Mr. Haddow, what I would ask for
11 is to the extent that they identified that a
12 contact was made, that in and of itself, to my
13 view, is also relevant. And I don't think I'm
14 asking for that much. So --

15 THE COURT: Here's what I heard Ms. Polk say,
16 is there is a preliminary report. And that's been
17 provided. She's going to look through her notes.
18 That if the information has been provided, not
19 provide the notes.

20 Correct, Ms. Polk.

21 MS. POLK: Yes, Your Honor.

22 THE COURT: Did you understand that?

23 MR. LI: Okay. But then I guess what I would
24 want to know, then, is how -- well, I would at
25 least want the dates that these contacts was made

1 and that substance was discussed.

2 THE COURT: I think that's a reasonable thing,
3 just a logging type thing if there is a discussion.
4 But I still agree with my ruling on how the -- how
5 it generally works with disclosure. This is a
6 different situation. I understand that. And it
7 has to do with the Brady issue.

8 So, Ms. Polk, in any event, I know you
9 will do this. But I'm ordering that you preserve
10 your notes, in any event, that they don't need to
11 be disclosed at this point. But they do have to be
12 reviewed to make sure that all -- anything that has
13 to be disclosed in terms of opinion, basis of
14 opinion, the defense has to know all of that.

15 And if it's not completely in other
16 emails or documents that are turned over, then it
17 could well be the notes have to be supplied.
18 And -- but also in terms of dates, just logging
19 dates. And if there is a discussion, that is
20 appropriate to disclose too.

21 MR. LI: And I would make, Your Honor, just an
22 additional request. And obviously I'd submit it to
23 the Court. But to the extent that there is
24 exculpatory information contained in those notes,
25 we think there is a separate basis for us to be

1 provided those notes.

2 THE COURT: And I -- it's been said -- it goes
3 without saying. But you have made that clear.

4 And, Ms. Polk, I know you understand
5 that.

6 MS. POLK: Yes, Your Honor.

7 THE COURT: Okay. Then moving on to 2. That
8 has to do with the sheriff's office and --

9 MR. LI: Your Honor, I think we generally have
10 an agreement. And I'm sorry --

11 THE COURT: However you're comfortable.
12 That's fine.

13 MR. LI: Okay. You know, I think we have a
14 general agreement that all communications will be
15 provided, that Detective Diskin has kindly agreed
16 to go through his emails and see whether or not --
17 you know -- he received emails from Lou Diesel, who
18 apparently is the refer -- the person who referred
19 Mr. Haddow to the state.

20 Apparently Mr. Diesel referred Mr. Haddow
21 to the state sometime in January. And then there
22 was -- I guess Mr. Haddow appeared at
23 Detective Diskin's office and gave -- you know --
24 sort of described what his various findings might
25 be. And I think we need -- you know -- all of the

1 communications, notes, et cetera, that
2 Detective Diskin created.

3 And I think generally we have an
4 agreement that the detective will find all
5 communications, find notes reflecting
6 communications with Mr. Haddow and/or Mr. Diesel
7 relating to Mr. Haddow, and also any other
8 recording -- recorded statements relating to that.
9 I think we have an agreement on that.

10 THE COURT: Ms. Polk, do you concur?

11 MS. POLK: Yes, Your Honor.

12 THE COURT: Okay. Then Item 3?

13 MR. LI: Oh. And there was one other thing.
14 The email that is attached to our motion as
15 Exhibit A -- when you look at it online, it appears
16 that it has been redacted. So we have -- we've
17 asked, and I believe the state has agreed, that we
18 will be provided an unredacted version of that
19 email that we -- that we attached as Exhibit A.

20 THE COURT: Do you agree?

21 MS. POLK: I do, Your Honor. I'm not sure
22 what the -- we will take a look at the email. We
23 have agreed to provide to the defense the
24 transmittal information when that email was sent
25 from the sheriff's office to the county attorney's

1 office.

2 MR. LI: There's just some blank spots above
3 the email that look like there was -- you know -- I
4 mean, I --

5 THE COURT: I mean -- is that what you're
6 referring to? You thought there were other
7 recipients?

8 MR. LI: Yeah. Well, Your Honor, there --
9 there is the email. And then there's a couple of
10 lines of blank spots. And in my experience as an
11 emailer, that typically means that there has been
12 some chain and the substance of which has been
13 redacted. We just -- we're asking for an
14 unredacted version of that.

15 THE COURT: All right. That will be provided.
16 And then Item 3.

17 MR. LI: I think Item 3, we have an agreement.
18 Essentially, what we would need is a court order
19 directing -- you know -- that this information be
20 provided. We would send the Court order to
21 Mr. Haddow, and hopefully he would comply.

22 THE COURT: Ms. Polk.

23 MS. POLK: Your Honor, the state agrees and
24 has suggested to the defense that they handle that
25 end of it so the state is not involved in

1 transmitting information from Mr. Haddow to the
2 defense.

3 MR. LI: And in light of the Court's
4 scheduling and all of the things that are
5 happening, we would ask that Mr. Haddow produce it
6 forthwith.

7 THE COURT: I would facilitate that. We can
8 even do a separate minute entry I can sign. So
9 it's going to be disclosure under 15.1 -- oh. I'm
10 sorry -- 15.2(g). It's going to go through the
11 defense. So -- it wouldn't be disclosure under
12 15.1(g); correct?

13 MR. LI: That's correct.

14 THE COURT: So then I just would like a minute
15 entry pursuant to 15.1(g). The Court orders --
16 and -- who should be directly -- who do you suggest
17 be the provider? Just the expert?

18 MR. LI: Yes, Your Honor.

19 THE COURT: Okay. I don't know if there is
20 any other entities involved or something like that.
21 But I want this order to cover what it needs to
22 cover.

23 MR. LI: I see. I see. I think that that is
24 the -- that is the right party. And I think -- you
25 know -- again, I can't emphasize enough the timing.

1 If it could be by the end of the -- close of
2 business today or some forthwith.

3 Because what we're trying to do is, in
4 order to work within the Court's schedule, we
5 would -- we're trying to get all this information
6 so we can digest it and then do the interviews that
7 are requested below.

8 MS. POLK: And, Your Honor, the state agrees
9 with that. What the parties had talked about was
10 arranging the interview with Mr. Haddow in the
11 Phoenix area tomorrow afternoon.

12 The one issue that I would raise is
13 Mr. Li has pointed out to us that the lawsuit that
14 Mr. -- that Lou Diesel represents some parties on
15 against Angel Valley has not been settled yet. And
16 Mr. Haddow -- we believe he was retained by
17 Mr. Diesel in that case. And so Lou Diesel might
18 have some interest in objecting.

19 MR. LI: And, Your Honor --

20 THE COURT: Go ahead.

21 MR. LI: It's Rick Haddow and also Haddow
22 Environmental Research Organization. So both him
23 and his corporate entity.

24 With respect to Mr. Diesel, I guess I
25 would submit that if he had a concern about

1 Mr. Haddow being exposed to discovery and to the
2 process of the criminal court system, he probably
3 should not have picked up the phone and offered
4 Mr. Haddow.

5 THE COURT: There would likely be a deposition
6 ordered by this Court if there is any kind of
7 concern over that. But I want -- pursuant to
8 Rule 15.1(g), it's ordered that -- is it Richard
9 Haddow or Rick Haddow?

10 MR. LI: Well, he signs it Rick, but it's
11 Richard Haddow.

12 THE COURT: Richard Haddow and Haddow
13 Environmental Resources --

14 MR. LI: Research.

15 THE COURT: -- Environmental Research --

16 MR. LI: Organization.

17 THE COURT: -- Organization. Provide any and
18 all reports, including drafts or preliminary
19 reports, statements, examinations, and notes made
20 in connection with the October 8, 2009, sweat lodge
21 incident at Angel Valley. The information is to be
22 provided -- I don't know what to say in terms of
23 that.

24 MR. LI: Forthwith by --

25 THE COURT: Forthwith.

1 MR. LI: -- close of business today.

2 THE COURT: Okay. I'll say that. I

3 understand there can be some -- some problems. But
4 we do need to move it along. But yes. My -- where
5 is he -- where is he located?

6 MR. LI: Apache Junction.

7 THE COURT: Okay. So by 5:00 p.m. Arizona
8 time.

9 MR. LI: And, Your Honor, since we're making
10 this order, there are additional -- 4 and 5 also
11 relate to documents that Mr. Haddow either received
12 from the Yavapai County Attorney's Office or the
13 Yavapai County Sheriff's Office. And with respect
14 to 5, those are all the documents that Mr. Haddow
15 relied on in reaching any conclusions.

16 I would also note that I believe the
17 state has agreed that Detective Diskin -- that they
18 will provide -- you know -- any records that they
19 have. And I think it's been represented to me that
20 they don't have any records about what documents
21 they have provided to Mr. Haddow.

22 I believe Detective Diskin stated that
23 Mr. Haddow got a fair amount of his information
24 from Lou Diesel, who obtained it through public
25 information requests. But then Detective Diskin

1 supplemented that production with additional
2 documents. He did not make a record of it. He
3 apparently -- Detective Diskin told me that he gave
4 Mr. Haddow a CD of it but didn't make a copy of the
5 CD.

6 And -- and I -- and my understanding from
7 the state is that there are no other records of any
8 additional disclosures to -- from the state, either
9 the sheriff's department or in the Yavapai County
10 Attorney's Office -- no other disclosures to
11 Mr. Haddow.

12 MS. POLK: And, Your Honor, two things. It
13 just occurred to me that we did receive numerous
14 public records requests and kept a log of
15 everything that we disclosed. I'll double check
16 that to see if any parties related to Mr. Haddow
17 did a public records request. And if so, we'll get
18 it to the defense.

19 And then second, Your Honor, if the Court
20 could order the defense to provide, then, copies to
21 the state of each and every document that
22 Mr. Haddow provides to them.

23 MR. LI: That's fine, Your Honor.

24 THE COURT: Okay. That's ordered. I'm really
25 going to need a proposed order that is consistent

1 with the agreements rather than try to just fashion
 2 something. I really want to facilitate this in any
 3 way I can. But if you can do that, I'll be here
 4 obviously in the morning.
 5 MR. LI: I --
 6 THE COURT: Just get a proposed order on what
 7 you agree on so I can get something signed and --
 8 MR. LI: Not a problem.
 9 THE COURT: -- and circulated today.
 10 Okay. So with regard to -- so 3 and 4
 11 have been covered.
 12 MR. LI: 5 as well.
 13 I think this is more directed towards
 14 Richard Haddow and should probably be part of the
 15 15(g) -- 15.1(g) motion -- or order that is
 16 currently being drafted. It's just what did he
 17 rely on.
 18 THE COURT: That's what I'm saying. I -- what
 19 I'm asking now, is it still going to be considered
 20 under 15.1(g) for Mr. Haddow and his business? I
 21 want the parties to -- to fashion an order for me
 22 this morning.
 23 MR. LI: I --
 24 THE COURT: It's more comprehensive than what
 25 I thought we were going to be dealing with. So --

1 MR. LI: I see. Okay, Your Honor, we'll do
 2 that.
 3 THE COURT: And this one -- this one is close,
 4 but it just needs to be tailored, I think, a bit.
 5 Then -- okay. And so is everything
 6 understood and agreed per the discussion on the --
 7 1 through 5?
 8 MS. POLK: Yes, Your Honor.
 9 MR. LI: Yes, Your Honor.
 10 THE COURT: Okay. Then on page 3.
 11 MR. LI: Okay. So then we have
 12 Detective Diskin's interview, which we would try to
 13 schedule for sometime next week after we've had a
 14 chance to talk to Mr. Haddow. And I think
 15 everybody is in agreement with that.
 16 THE COURT: Correct?
 17 MS. POLK: Yes, Your Honor.
 18 THE COURT: Okay.
 19 MR. LI: Then an interview of Richard Haddow,
 20 which it would take place after the disclosures of
 21 the various items that we've discussed here.
 22 We are contemplating an interview
 23 tomorrow. Obviously it depends on whether or not
 24 we get the information that we're asking for. We
 25 will -- so we'll make all of this -- I'm assuming

1 everything that we talk about here today,
 2 Your Honor, we'll put in the order.
 3 THE COURT: Yes. That's what I'm asking.
 4 MR. LI: So with respect to -- as much as we'd
 5 like to interview Ms. Polk, I think we'll withdraw
 6 that request. And also as much as we'd like to
 7 interview Mr. Hughes, we'll also withdraw that
 8 request.
 9 THE COURT: All right. Okay.
 10 MR. LI: And then we'll -- we'll send the
 11 order in as fast as we can type it.
 12 THE COURT: Anything else this morning,
 13 Mr. Li?
 14 MR. LI: No.
 15 THE COURT: Ms. Polk?
 16 MS. POLK: Your Honor, there were -- there are
 17 some other legal issues on miscellaneous matters.
 18 Do you want to take them up now?
 19 THE COURT: We can do that if -- I'm really --
 20 I'm concerned about the other matter. But anything
 21 that needs to be done before for the trial to
 22 continue with the least inconvenience I want to
 23 cover.
 24 So what issue, Ms. Polk?
 25 MS. POLK: Your Honor, on the issue of the

1 permits, it's not clear to me how --
 2 THE COURT: On the issue of?
 3 MS. POLK: The permits. The idea of a permit
 4 for a sweat lodge. It's not clear to me how that
 5 got resolved.
 6 THE COURT: I think it was kind of dropped
 7 when the motion to continue came up. So we didn't
 8 really finish that completely. I indicated I
 9 saw -- I understood that -- the relevance from the
 10 standpoint Mr. Kelly was urging. And with regard
 11 to Ms. Mercer, if she was going to continue to
 12 testify, I would be concerned with asking her to --
 13 to endorse legal matters that she might not know
 14 about. At the same time, inquiring about legal
 15 matters that might have affected her conduct, I
 16 thought, would be appropriate.
 17 MR. KELLY: And, Judge, I believe what we
 18 intend to do is conduct the investigation I earlier
 19 described, doing some preliminary contact with the
 20 Yavapai County to determine, first of all, whether
 21 the permits are required. I believe both sides
 22 believe it is.
 23 And then secondly, and more importantly,
 24 determine whether, if a permit was issued, would
 25 there be some type of on-site inspection. The

1 answer to that question is yes, what that
2 inspection entailed. And given the time period of
3 recess, we intend to do that as soon as possible.

4 THE COURT: And I -- I do have now the
5 April 11th filing, Ms. Polk, where you itemize
6 these. I think Mr. Li indicated that -- I mean,
7 some of them have been addressed. But now
8 obviously when you have motions during trial,
9 they need to be addressed in an expedited fashion
10 many times.

11 But that's where the permit stands. I
12 see potential relevance there. But I acknowledge
13 the point of not having improper legal opinion come
14 in.

15 MS. POLK: Well, I think I heard Mr. Kelly say
16 they would do further investigation to bring the
17 issue back to the Court on whether or not a permit
18 was required.

19 THE COURT: That will be the general guideline
20 to it, in any event.

21 MR. KELLY: And obviously we would disclose
22 this information to the state as soon as it's
23 received.

24 THE COURT: And I know, Ms. Polk, that you did
25 request expedited ruling on the matter. And

1 there hasn't been a response by the defense. And
2 it's past time on that. It has to do with the
3 civil lawsuits. But I don't want to move on to
4 that if there is other things.

5 MS. POLK: Well, the last issue with regard to
6 the Hamiltons is the issue of the lawsuit filed by
7 Ivan Lewis in the United States District Court,
8 which was dismissed with prejudice. And I believe
9 that there is no probative value to that particular
10 lawsuit.

11 THE COURT: Mr. -- who is going to address
12 that?

13 MR. LI: Well, I guess -- well, we don't want
14 to get into the details of any of this. But I
15 think there is a -- there has been a suggestion, an
16 implication, and perhaps not intentional by the
17 state, that the Native Americans who variously
18 conducted sweat lodges not run by JRI did it right
19 because they were Native Americans.

20 And I think it's probably worthwhile to
21 suggest that, without getting into the details,
22 that many Native Americans don't approve of how the
23 Hamiltons have run their sweat lodge irrespective
24 of whether it was JRI or somebody else.

25 I just think there's been a suggestion

1 that the Hamiltons have the stamp of good
2 housekeeping by the Native American community. And
3 I simply don't think that's the case. I think Fawn
4 Foster was at pains that -- indicate that -- to
5 discuss her heritage.

6 I think there has been some -- you
7 know -- a fair amount of discussion about the names
8 of the various people. And I think it's a fairly
9 limited inquiry. It doesn't have to do with the
10 merits of any lawsuits. It is simply that the idea
11 that, one, the Hamiltons don't have any particular
12 greater seal of good housekeeping than anybody else
13 does for the -- how sweat lodges are run and
14 constructed and maintained.

15 MS. POLK: And, Your Honor, first of all, that
16 lawsuit was brought against the defendant as well.
17 So it's not just against the Hamiltons, but it was
18 against the defendant. It sounds to me as if
19 Mr. -- it has no probative value because it has
20 been dismissed with prejudice. And the reason why
21 the fact of a lawsuit might be relevant in a case
22 is because it goes to the motive or bias of a
23 witness. That's the only permissible use of it.

24 What Mr. Li has just suggested to the
25 Court is using that lawsuit to prove the truth of

1 the matter asserted, which are some assertions, as
2 I recall, that the sweat lodge should not have been
3 conducted at the Angel Valley Retreat Center.

4 But that would be precisely why it should
5 be inadmissible. It's being offered through the
6 truth of the matter. And it is a lawsuit that --
7 that has been dismissed with prejudice at the
8 United States District Court.

9 If the Court -- I can't recall if we --
10 if we provided you with a copy of the lawsuit
11 itself.

12 THE COURT: The order.

13 MS. POLK: Okay.

14 THE COURT: I've got the order -- the order
15 dismissing.

16 MS. POLK: I can certainly provide the Court
17 with a copy of that lawsuit.

18 MR. LI: We -- we don't -- we don't intend to
19 go into the details of the lawsuit. I think the
20 only point we're making is that there has been a
21 suggestion through -- elicited through various
22 witnesses associated with Angel Valley. Fawn
23 Foster, for instance, and then Ted Mercer also.
24 That's the only folks who -- some sort of almost --
25 you know -- and I don't want to -- I'm not

1 belittling this at all.

2 But I think there has been a suggestion
3 that the Native American community approved of the
4 way -- you know -- Angel Valley runs their sweat
5 lodges but doesn't approve of the way Mr. Ray does
6 anything.

7 And so -- again, I think Fawn Foster was
8 pretty clear about that. And I also think that
9 Mr. Mercer -- you know -- had a lot -- we had a lot
10 of discussion about the various names of the people
11 who were conducting -- facilitators who were
12 conducting the sweat lodge.

13 Mr. Kelly and I approached at sidebar.
14 We had a lot of discussion about that. And the
15 Court agreed that the suggestion was not
16 permissible and appropriate. And we just think all
17 we need do is a very focused, limited
18 cross-examination about the -- the Hamiltons that
19 they don't have any -- you know -- seal of good
20 housekeeping. And, in fact, they have some
21 contentious relationships as well.

22 MS. POLK: Your Honor, the state has not
23 offered evidence along those lines at all. Through
24 the testimony, which is the cross-examination of
25 Fawn Foster, when Mr. Kelly brought out the fact

1 that she was angry, opened the door. And then on
2 redirect I asked her why she was angry. And that's
3 where she said she felt that nobody should be
4 charging. But the state has never offered or
5 attempted to offer any evidence to suggest that
6 only certain cultures can conduct a sweat lodge.

7 MR. LI: If we got a stipulation from the
8 state that says something along -- you know -- we
9 could come up with some statement that says there
10 is no suggestion here that -- you know -- only one
11 community can -- you know -- can do this properly,
12 I -- and if the Court would get behind that -- you
13 know -- as a matter of law, then I -- we wouldn't
14 have -- this problem wouldn't be as much of an
15 issue.

16 MS. POLK: Your Honor, the state's own expert,
17 Doug Sundling, is not Native American. I'm just
18 not sure where this -- this argument is coming from
19 that somehow the state has tried to suggest that
20 only Native Americans can conduct sweat lodges.
21 It's not part of the state's case. And it's mixing
22 apples with oranges. This federal lawsuit has been
23 dismissed with prejudice against Angel Valley. And
24 I don't know if the court order also says against
25 Mr. Ray. But it has no probative value at all.

1 MR. LI: We're not asking to introduce the
2 lawsuit, just the fact of it, the fact that there
3 are contentious relationships and the fact that the
4 Hamiltons don't have any particular monopoly on
5 this or any particular -- you know -- license
6 from -- from some organization that says what they
7 do is okay.

8 THE COURT: I'm going to deal with the -- the
9 lawsuit part of it. And I'm looking at this order.
10 And it's not admissible and implicating dismissal
11 on a highly technical federal law grounds or Indian
12 law grounds. And so I'm not going to permit the
13 lawsuit.

14 In terms of general questioning about
15 that very briefly, there could be some relevance.
16 There has been some suggestion. But the lawsuit is
17 not going to be talked about.

18 MR. LI: Okay.

19 MS. POLK: I understand the Court's ruling.
20 The only issue would be if questions of a leading
21 nature coming from the defense, then, again, the
22 other rules need to be followed, that they have to
23 have a good-faith basis so that information would
24 otherwise be offered during the trial. And that
25 it's not just simply hearsay. But I'm not sure

1 what the line of questioning would be.

2 MR. LI: Your Honor --

3 THE COURT: Mr. Li, your concern is to
4 indicate that there is not some endorsement.

5 MR. LI: Yeah. I mean, it's not --

6 THE COURT: And that would seem to be, like, a
7 one-, possibly two-question area.

8 MR. LI: Yes. But it --

9 THE COURT: But I think what Ms. Polk is
10 saying, you go into these areas and then things
11 happen --

12 MR. LI: Well, let me put it this --

13 THE COURT: -- you know.

14 MR. LI: Let me put it this way: There's --
15 there's -- I always hesitate to say one more
16 question because there is always -- you know --
17 another question. But -- you know -- one of the
18 issues is just from my experience in dealing with
19 Ms. Hamilton. And I have reviewed her transcript
20 many times now. She does not always answer the
21 question posed.

22 And so I understand the risk that the
23 Court and the state has outlined. But it is -- it
24 is just, essentially, two areas of inquiry. One is
25 you don't have some special seal of approval. And

1 the flip side is -- of that is, in fact, there
2 are folks in the Native American community who have
3 strongly -- or who have expressed to you their
4 strong disagreement with your practices. And that
5 would not be hearsay.

6 That would be simply the fact that she
7 has been told by folks in a community or even a
8 person who represents himself or herself to be a
9 member of the community and saying -- you know --
10 look. We don't approve of what you're doing.

11 THE COURT: And that sounds like it's being
12 offered for the truth.

13 MR. LI: Well, it would be at least -- if you
14 received -- where you received complaints, then.
15 Things like that, Your Honor.

16 MS. POLK: Which would be hearsay.

17 MR. LI: That wouldn't. That actually
18 wouldn't.

19 THE COURT: Well -- you know -- the first part
20 of the question I make -- the first question I
21 don't have an issue with about having some special
22 endorsement or something like that or some
23 approval.

24 But then getting into what -- how
25 reputations and that, I don't see that as relevant

1 right now. But as the case goes along and I hear
2 more evidence, I -- you have to deal with things as
3 they come up. But I don't -- I don't see the
4 relevance.

5 MR. LI: Here's one of the problems: Okay?
6 So -- and I've just been reviewing the transcripts.
7 And so -- you know -- Ms. Mercer is another one of
8 these folks. Now, they talk a lot about the
9 tradition is. Traditionally we do four rounds.
10 First of all, that's just -- I mean, there are so
11 many different traditions out there. So it all
12 implies that the tradition is -- the approved
13 Native American tradition is four rounds, something
14 like that.

15 And I guess the point I'm making is that
16 not only do they not have any seal of approval for
17 that statement or any other statement like that,
18 but there are people out there who disapprove or at
19 least have expressed to them that they disapprove.

20 THE COURT: If that information that you
21 mentioned had -- was not objected to, then there --
22 there was the remedy to prevent that.

23 MR. LI: Well, it was objected to --

24 THE COURT: If I did overrule it and allow it,
25 then cross-examination --

1 MR. LI: It absolutely was objected to. And
2 we had sidebars about -- you know -- look, Your
3 Honor. Are we going to go into how -- you know --
4 what the standard of practice is for this? There
5 have been many objections about whether or not the
6 state should be permitted to go into other sweat
7 lodge ceremonies and also into the specifics of it.
8 So --

9 THE COURT: And these are people who are
10 dealing with sweat lodges. And there's general
11 relevance as to why they're doing what they're
12 doing, what they think about it, those kinds of
13 things. But I understand what you're saying.

14 And if it came --

15 You know, Ms. Polk, if that testimony did
16 come in over objection, it somehow could have been
17 some slant on it. And there is -- some
18 cross-examination into that could be appropriate.

19 But the federal lawsuit is not going to be --

20 MR. LI: I understand, Your Honor.

21 THE COURT: Not going to be mentioned.

22 MR. LI: Understood.

23 THE COURT: That's what was specifically
24 raised.

25 MR. LI: Understood.

1 Your Honor, I have a few -- oh. Sorry.

2 MS. POLK: If I can still keep working on my
3 list.

4 MR. LI: Yeah. Sure. Get it done.

5 MS. POLK: Your Honor, we had filed a motion
6 in limine. It's been quite some time, October 26.
7 And specifically this would pertain to the
8 testimony of Detective Diskin, who will be taking
9 the stand soon.

10 THE COURT: What I'm going to do is --

11 Heidi, I didn't know we were going to be
12 addressing all these other things. I'd like to
13 have that -- the sheet of the pending motions and
14 then also the hard copies of the pleadings.

15 MS. POLK: Your Honor, I can come --

16 THE COURT: Sorry, Ms. Polk.

17 MS. POLK: I can come back to that. Also
18 pending are two Rule 15.6 motions from the state.
19 One is to use the certified articles of
20 incorporation and annual list for James Ray
21 International. We have received them, provided
22 copies to the defense.

23 THE COURT: Okay. I have my list now.
24 What specifically are you referring to?

25 MS. POLK: Do you want me to go back to --

1 THE COURT: Yes. Where you started. Now that
2 I've got the materials here and I've got my list, I
3 can keep track now.

4 MS. POLK: The state's motion in limine on
5 October 26. We've got two matters there that have
6 yet to be -- or three matters to be addressed.

7 THE COURT: And that's -- that was -- what's
8 the title of the pleading?

9 MS. POLK: "State's Motion in Limine
10 Regarding Pretrial Issues."

11 THE COURT: And that's something I brought up
12 several times. And it's always -- it was mentioned
13 that we will deal with that at the appropriate
14 time. And you're saying this is the appropriate
15 time?

16 MS. POLK: Uh-huh.

17 THE COURT: Okay.

18 MS. POLK: But --

19 MR. LI: We're getting our copy, Your Honor.
20 I don't -- I don't have it in front of me.

21 THE COURT: You know what would help. If we
22 get the list and then I can get organized, and then
23 we can after recess come back and then -- and then
24 address that.

25 So, Ms. Polk, would you -- I'm aware of

1 that one, the pleading of October. What other
2 matters do you want to address so I can get those
3 in order?

4 MS. POLK: The two pending 15.6 motions, one
5 filed on March 24th pertaining to -- or, I'm sorry.
6 Filed on --

7 THE COURT: I have three. One filed -- 3/14,
8 3/24, and 3/28.

9 MS. POLK: Yes. And so we'd like to address
10 all three of those, although I believe one has
11 already been addressed.

12 THE COURT: Okay.

13 MR. LI: So, Your Honor, it was 3/14, 3 --

14 THE COURT: -24, and 3/28.

15 MS. POLK: And then still pending from the
16 state's perspective is the state's request --
17 motion to compel disclosure of civil lawsuits filed
18 against James Ray and JRI.

19 THE COURT: And that's the one I have reviewed
20 this morning.

21 MS. POLK: And also there is one pending issue
22 from a motion in limine that the defense had filed.
23 It pertains to a -- it's a video, an overview of
24 the sweat lodge that the state would intend to play
25 through the testimony of Detective Diskin. And the

1 defense has objected to that.

2 THE COURT: Okay.

3 And, Mr. Li or any of the defense team,
4 is there anything that you'd like to address of a
5 legal nature?

6 MR. LI: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. LI: With respect -- these are more sort
9 of pinpoint evidentiary issues. So we don't
10 have -- we didn't draft a pleading on this. With
11 respect to Amayra Hamilton, who I understand is
12 testifying soon, I think we still have an open
13 issue about discussions about settlements under
14 408(a).

15 And -- you know -- given Ms. Hamilton's
16 tendency not to answer questions and to say what
17 she wants to say, we think that -- you know -- some
18 pretestifying admonishment would be appropriate
19 relating to -- you know -- listen. She has been
20 sued. Her entity has been sued. And I don't want
21 her to just blurt out -- you know -- oh. Yeah.
22 And -- you know -- we didn't settle, but -- you
23 know -- Mr. Ray has made settlements.

24 THE COURT: Well, in a way, I think -- I want
25 to address each of these topics --

1 MR. LI: Yes.

2 THE COURT: -- to the extent I can right now.
3 But I don't like to be involved in singling out a
4 witness unless it becomes a problem with the way
5 questions are being answered or any of those
6 things. And I don't like to do that.

7 So what I'm going to do is make sure that
8 Mr. Hughes or Ms. Polk talks to the witnesses
9 beforehand.

10 If there's any -- I don't know. I'm not
11 taking any side on this. I hear what Mr. Li is
12 saying. And I've certainly seen witnesses that
13 have -- in many trials that have that kind of a
14 problem, if you want to call it that.

15 So rather than just start off with me
16 interjecting, I'm just going to -- if there is that
17 kind of a problem -- I don't know that there is.
18 But if there is, discuss that so it doesn't happen.

19 MR. LI: That's fine, Your Honor. I mean,
20 just for the record, she did testify in this
21 courtroom. And I've just been reviewing the
22 transcripts. And they are -- it takes a very long
23 time to get to the answer.

24 THE COURT: You know, and another thing that
25 occurred to me with the people that had testified

1 in the 404(b) proceeding, that was a whole
2 different standard of the evidence coming in. And
3 it might be somewhat confusing to them now also.
4 But it's a much stricter standard of what can be
5 stated in court. So some real instruction to
6 everybody's witnesses in that regard. But the
7 people who testified at the 404(b) especially, that
8 could be useful.

9 MR. LI: Thank you, Your Honor.

10 THE COURT: Okay.

11 MR. LI: I think with respect to -- there's a
12 few other issues with respect to Ms. Hamilton.
13 There's a -- there is a 2005 incident involving
14 Daniel P. I think -- you know -- I proffer to the
15 Court that this is now entirely irrelevant to the
16 current situation even on the causation theory that
17 the Court has now allowed prior sweat lodge
18 testimony to come in.

19 First, as the Court saw, there is -- and
20 found, there is no evidence that Mr. P. was --

21 THE COURT: Actually, at this time I just want
22 to compile a list --

23 MR. LI: Okay.

24 THE COURT: -- so that --

25 MR. LI: Okay. But that's one of them. The

1 exclusion of the 2005 incident. And for two
2 basis -- bases. One is the Court's prior finding
3 about no -- you know -- no life-threatening
4 condition and the 404(b) ruling and also a 403
5 ruling.

6 And then, secondly, in light of the
7 Haddow report and in light of the fact that
8 Mr. Mercer says that at least the big rubber gasket
9 wasn't used until sometime in '08 or '07 that
10 Mr. Hamilton said, hey, use this, that there is no
11 evidence that the sweat lodge -- any part of the
12 sweat lodge was the same.

13 And I would note that, Your Honor, that I
14 think this is probably three kivas -- generations
15 of kivas before. I think there was one in '08, one
16 in '07, and this one -- this one in '05. So I
17 think -- '06. Sorry. So there were a number of
18 changes -- you know. And I won't argue the point.
19 But there are just --

20 THE COURT: I'm just trying to get a list --

21 MR. LI: Yes.

22 THE COURT: -- to see what we've got to deal
23 with.

24 MR. LI: But the bottom line is that there is
25 no foundation that this is the same lodge in any

1 way than the one used in 2009. And because the
2 medical conditions were not life threatening, I do
3 not --

4 THE COURT: I just want to say, Mr. Li, this
5 has occurred to me before your mentioning it --

6 MR. LI: Okay.

7 THE COURT: -- in light of the whole motion
8 that we heard yesterday.

9 MR. LI: Yes.

10 THE COURT: So --

11 MR. LI: And so just the Haddow report, I
12 think, really puts the pin in it.

13 THE COURT: And Ms. Polk now knows what your
14 concern is as well. But I didn't want to -- I
15 didn't want to have --

16 MR. LI: Understood. I won't -- I won't wear
17 out my welcome.

18 The -- another issue relates to this
19 incident. If the '05 incident is allowed, then
20 there is this incident in which Ms. Hamilton called
21 9-1-1. And there is an exchange between Mr. Ray
22 and Ms. Hamilton about it.

23 THE COURT: And it was the subject of a 403
24 determination I made when it appeared Mr. Kelly
25 could have opened the door. And under 403, I

1 didn't allow discussion with regard to -- I think
2 it was Melinda Martin was the -- was the witness on
3 that.

4 MR. LI: Yes.

5 THE COURT: So, yes. I'm familiar and --

6 MR. LI: Okay.

7 THE COURT: And I understand.

8 MR. LI: And we would request the same ruling
9 because -- just to be -- so -- you know -- there
10 was no delay at all in 2009 calling 9-1-1.

11 The last point, and this is a very small
12 point, Your Honor, is -- and I don't know whether
13 the state even intends to bring this up. But I
14 just -- I want to make sure I cover everything.
15 You know, several witnesses, including
16 Ms. Hamilton, have various ways of characterizing
17 Mr. Ray's sort of demeanor and what have you after
18 the sweat lodge ceremony. We would move that all
19 of that be excluded.

20 She didn't see everything. And it's,
21 frankly, not relevant what she thinks Mr. Ray's
22 various -- you know -- whether he's happy, sad --
23 you know -- arrogant, whatever. All of those
24 things are not relevant for this inquiry.

25 THE COURT: I think that was addressed in a

1 motion -- a written motion you made with regard to
2 postsweat lodge conduct or something styled that.

3 MR. LI: It was, Your Honor.

4 THE COURT: Okay.

5 MR. LI: I'm just -- I'm just trying to -- you
6 know, I worry about this particular witness, as
7 some of these witnesses do have a tendency to get
8 very florid in their descriptions of -- of things.
9 And I -- you know -- just want to -- you know --
10 put some boundaries.

11 THE COURT: Okay. I just don't think the
12 state has any real dispute about that. I won't
13 speak to that again.

14 I want lists at this point, and I guess I
15 have them. So, again, we'll recess and let me look
16 back through the documents.

17 Thank you.

18 (Recess.)

19 THE COURT: The record will show the presence
20 of Mr. Ray and the attorneys.

21 And I understand that there is apparently
22 some disagreement on parts of the order. I did
23 sign the order relating to Mr. Haddow. And that's
24 being processed. It will be emailed very soon.

25 But what's the issue with the other part

1 of this?

2 MS. POLK: Your Honor, first of all, I didn't
3 realize that we were looking for a written order
4 about all the matters we were discussing. I
5 thought the issue was to get a written order out to
6 Rick Haddow to get that information sent to the
7 defense and get his interview scheduled.

8 Separately from that, the defense had
9 prepared a proposed order about the other matters
10 we discussed here this morning.

11 THE COURT: Oh.

12 MS. POLK: I don't think that we need to
13 reduce those to a written order directed to the
14 state. We have agreed already to provide to the
15 defense the transmittal information for that email
16 that we found.

17 We have agreed -- I'm going to check our
18 public records to see if we have received a public
19 records request from either Mr. Haddow or Lou
20 Diesel and what that information was.

21 We have agreed to make Detective Diskin
22 available for an interview.

23 So trying to document that or put it in
24 the form of an order that's issued against the
25 state, I just simply don't think is necessary.

1 THE COURT: Well, it's been ordered, and it
2 stands. And if there is any issues that requires a
3 written order at some time, then I'll look at it.
4 But for right now, the order should be clear. It's
5 on the record.

6 Mr. Li.

7 MR. LI: We were just following the Court's
8 instructions.

9 THE COURT: And I was more concerned with
10 getting everything ready for Mr. Haddow to be
11 interviewed and making sure all that information
12 was available. I don't think I was very clear on
13 that issue. So --

14 MR. LI: Well, and I just wanted -- I -- we
15 had only asked the Court what the Court wanted in
16 all these agreements and all the discussions on the
17 record. So I just prepared an order along those
18 lines.

19 THE COURT: And if it wasn't that clearly
20 stated --

21 MR. LI: I don't need to --

22 THE COURT: This is the most important part of
23 what's been signed now. And we do have 15 minutes
24 anyway, and we can take up what you -- you think
25 needs to be addressed now.

1 Ms. Polk.

2 MS. POLK: Your Honor, can we address the two
3 pending 15.6 motions?

4 THE COURT: Yes.

5 MS. POLK: The motion that I have dated
6 March 14 --

7 THE COURT: Okay.

8 MS. POLK: -- pertained to a letter --

9 THE COURT: All right.

10 MS. POLK: It has three items. The first is
11 the letter dated March 7, 2001, from Jack Silver to
12 James Arthur Ray regarding the unauthorized use of
13 trademarks/false statements relating to the Grof
14 Transpersonal Training and Dr. Stan Grof.

15 The second is an email. And it's dated
16 March 6, 2011, from Lance Jerro to Detective Diskin
17 regarding the use of the Samurai Game.

18 And then the third is the letter dated
19 March 5th, 2001, from Chris Major to Lance Jerro.
20 That also pertained to the unauthorized use of the
21 Samurai Game.

22 The state pursuant to 15.6 is requesting
23 permission to use those three letters in this
24 trial -- or those three communications.

25 THE COURT: Okay.

1 Mr. Li, then, I'm looking at the
2 March 14.

3 MR. LI: Your Honor, there are two separate
4 issues. There is the gatekeeping issue which
5 relates to the late disclosure. And that's what is
6 addressed by 15.6(d). And then there is a
7 subsequent admissibility issue relating to these
8 letters. And on the late disclosure, there is no
9 particular reason why these things need to be
10 disclosed. Strike that actually.

11 With respect to these letters, they were
12 sent late. So now just with respect to -- to these
13 letters, they're completely irrelevant to a
14 manslaughter trial. Whether or not a trademark
15 over the Samurai Game or using the term "Holotropic
16 breathing" or anything like that is the subject of
17 some trademark claim or some other sort of claim of
18 improper usage or unauthorized usage is entirely
19 irrelevant to whether or not Mr. Ray acted
20 recklessly in causing the deaths of three people.

21 Oh. And Ms. Do reminds me that they did
22 actually interview Lance Jerro seven to eight
23 months ago and knew that they were claiming some
24 sort of a trademark issue.

25 None of this has any relevance at all. I

1 mean, it does not actually even meet the relevance
2 test. But on top of it, there is a 403 concern,
3 which is, essentially, that they're just claiming
4 yet another way to say that Mr. Ray is not a good
5 guy. And that has no relevance to this case,
6 Your Honor.

7 THE COURT: Ms. Polk.

8 MS. POLK: Your Honor, with respect to the
9 disclosure issues, the Court can see these are
10 items that the state did not receive until those
11 dates that are set forth in the motion.

12 With respect to the relevance, it is the
13 defense who has made the issue of the Samurai Game
14 relevant. And as the Court will recall, in
15 Mr. Li's opening he talked about the Samurai Game
16 and how it's played across corporate America and
17 then through the questioning of witnesses, again
18 tried to establish that this is the Samurai Game
19 that is played across corporate America.

20 I believe it was that testimony in the
21 trial, then, that caused the attorney for the
22 company that has the copyright to the Samurai Game
23 to send the letter to the defense -- they copied
24 the state -- saying that Mr. Ray has never been
25 licensed to play the Samurai Game, and the Samurai

1 Game that he played at Spiritual Warrior is not the
2 Samurai Game played across America.

3 This is another example of opening the
4 door and then allowing the state the fair
5 opportunity to flesh out the facts.

6 With respect to the -- Dr. Stan Grof
7 pertaining to the Holotropic breathing exercise
8 that the jury has heard about, and, again, the
9 testimony from participants has been that as they
10 entered the sweat lodge, they trusted Mr. Ray and
11 trusted that he knew what he was doing.

12 Information that he misrepresented to
13 participants what his qualifications were and what
14 his right was to be teaching throughout the week
15 and putting participants in a certain state of
16 mind, a certain physical condition as well as a
17 certain mental state of mind by the time they
18 entered that sweat lodge. So this is relevant to
19 both of those points.

20 MR. LI: Okay. And, Your Honor, one more
21 point. If the state -- I simply didn't actually
22 understand the scope of what the state wanted to do
23 with this particular evidence. But I guess from
24 Ms. Polk's presentation that they -- they intend to
25 try to move these letters in as evidence. They're

1 obviously hearsay, I mean, clear hearsay, and they
2 also lack foundation on top of being entirely
3 irrelevant.

4 Let's just assume for a second there's
5 different ways to play a game called the "Samurai
6 Game" where people pretend to be samurais. The
7 fact that some guy out there has some license and
8 says, no. No. No. That's -- only people who play
9 it my way can play the game called the "Samurai
10 Game" and to watch The Last Samurai clips. It's
11 completely irrelevant to -- to this manslaughter
12 trial.

13 With respect to the breathing exercises,
14 it's actually -- if you look at the actual
15 materials that Mr. Ray -- I'm not -- I'm not an
16 expert on Holotropic breathing or -- or breathing
17 exercises or what exactly you call it.

18 But if you actually look at the
19 materials, other than the waiver that Mr. Ray
20 provides to the participants, they're called
21 "breathing exercises." And it's not called
22 "Holotropic breathing." That name gets thrown
23 around a lot because, I guess, that's just what
24 many people call it. The way Kleenex -- the way
25 tissue is called "Kleenex."

1 And so this is -- you know -- these are
2 all hearsay. They're all irrelevant. There is a
3 403 issue on top of it. And we'd move for all of
4 these not to be permitted to be admitted in any
5 way.

6 THE COURT: Now, I just wanted to have one
7 round of argument, Ms. Polk. But you should have
8 the last -- do you have anything else on this?

9 MS. POLK: Just to say that it's not the way
10 that Mr. Li represented this game to the jury in
11 his opening statement or when he cross-examined
12 witnesses. He didn't say this is just a game we're
13 playing.

14 What he repeatedly has said is this is --
15 did you know that this is the same game played in
16 the military? Did you know that this is the same
17 game played cross corporate America? Did you know
18 that this game is played at corporate Disneyland?
19 Again, has opened the door suggesting that what
20 Mr. Ray was doing with his participants is what is
21 done through the Samurai Game.

22 What Mr. Ray -- how he conducted that
23 Samurai Game is not the way that the Samurai Game
24 is to be conducted. And, again, what Mr. Ray did
25 was through the week, how he -- the events that he

1 took his participants through created their
2 physical and their mental state of mind as they
3 entered that sweat lodge. And that's why it's
4 relevant.

5 Your Honor, the state has listed as
6 witnesses the -- Mr. Silver, Mr. Jerro, and
7 Mr. Major. They will come in and testify about it.
8 15.6 concerns itself with the documents that the
9 state would like to use. And that's why we filed
10 that motion. So that in connection with their
11 testimony, we can also use the letters that they
12 had sent to Mr. Ray.

13 THE COURT: I have the motion in front of me.
14 It's probably right here. But it corresponds to
15 what disclosure -- supplemental -- there. I see it
16 in the affidavit. Okay.

17 Okay. I have time to do written rulings,
18 as it turns out. I'll take this under advisement.

19 Thank you.

20 MS. POLK: The second 15.6 motion is the
21 state's request to use the Certified Articles of
22 Incorporation and the annual list for James Ray
23 International from the Nevada Secretary of State's
24 office. We have marked as an exhibit the certified
25 documents. We have provided them to the defense.

1 THE COURT: Okay. And just to --

2 MS. POLK: I would be -- I would like to
3 introduce them through the testimony of
4 Detective Diskin.

5 THE COURT: And just so we can have one round
6 of argument.

7 MS. POLK: And, Your Honor, the relevance, I
8 think, is obvious to the Court. Again, the defense
9 has brought up the whole corporate structure of
10 James Ray International and the Articles of
11 Incorporation showing who the president,
12 vice-president, secretary, and treasurer are. And
13 who they have been in the past is relevant in the
14 case and has been made relevant by the defense.

15 THE COURT: I want to make sure we have full
16 argument so Mr. Li can address them all.

17 Okay. Mr. Li.

18 MR. LI: I assume that's all -- all the things
19 I need to address. Your Honor, just -- first of
20 all, this is a late disclosure. Second of all, the
21 Articles of Incorporation are just the formation
22 documents for a particular company. The point that
23 the defense has been making is that, like every
24 company in America, many people have different
25 jobs. And so simply to throw the Articles of

1 Incorporation in front of the jury does not
2 actually -- it's completely irrelevant.

3 Every article of incorporation has to
4 list a secretary. It has to list -- you know --
5 various things. That doesn't mean that they list
6 who the event planner is or who all of these
7 various other entities are.

8 These are much more having to do with
9 simple just -- you know -- corporate governance
10 issues that are dealt with in terms of just
11 incorporating the company. And so they aren't
12 irrelevant for that purpose.

13 The real point of all of the testimony
14 has been that there are different people with
15 different jobs.

16 More importantly, this Court's ruling in
17 Pace -- relating to Pace addresses exactly this
18 issue, relating to the duty, relating to all of
19 those sorts of issues. And that it is -- it's
20 clear from the Court's ruling that the state has
21 failed to identify any duty owed by Mr. Ray for an
22 omission -- for the prosecution on an omission
23 theory.

24 And all of the evidence that they've
25 sought to introduce relating to the company, that

1 is, what kind of releases were obtained, medical
2 releases, whether there were -- you know -- one
3 kind of aid -- you know -- first-aid kit versus
4 another, what sort of training -- all of those
5 sorts of things have to do with independent duties
6 that they believe Mr. Ray failed to -- failed to
7 abide by, that somehow he omitted -- he had an
8 omission. And that's why he's being prosecuted.

9 Well, as the Court ruled, they've not
10 identified any duty that would create that sort of
11 liability. And so the consequence of all of this
12 is irrelevant and late.

13 THE COURT: Ms. Polk, anything else on that?

14 MS. POLK: Your Honor, only -- if the Court is
15 going to allow, I have nothing further. If the
16 Court is going to disallow, then --

17 THE COURT: Well, I'm going to take these -- I
18 just want to hear the argument. And then I'm going
19 to decide. So I don't know. What I --

20 MS. POLK: Well, just briefly, then. Again,
21 this is a matter raised by the defense. And as the
22 Court has repeatedly heard the defense question
23 witnesses using the term "JRI" and suggesting that
24 there is a distinction between JRI and Mr. Ray, the
25 Court will recall when counsel for the defendant

1 used the easel to draw an organization chart and
2 put a big circle with JRI at the top, drew a long
3 line down, and then put Mr. Ray here. And I had
4 actually asked that the drawing be preserved. So
5 it still is on the easel.

6 The point is that it's important for the
7 jury to understand that the president of JRI is
8 James Ray. The vice-president of James -- of JRI
9 is James Ray. The treasurer of JRI is James Ray.
10 The secretary of JRI is James Ray. And it has
11 always been that way.

12 The defense has tried to suggest to the
13 jury that there is this corporate structure up
14 there, this large corporation that Mr. Ray just
15 worked for. And that simply is not the case.
16 Mr. Ray is JRI. The state is not prosecuting the
17 corporation. But this is an area that was opened
18 by the defense. And the Articles of Incorporation
19 are relevant.

20 THE COURT: Thank you. And that matter is
21 under advisement as well.

22 And the third -- I know we have discussed
23 the third one. And you didn't bring it up,
24 Ms. Polk. But that had to do with Mr. -- well,
25 further investigation or the question of what is

1 further investigation. And that was the
2 March 24th.

3 The parties are satisfied with the ruling
4 as clear on that?

5 MS. POLK: Are we talking about the 13.6
6 motion?

7 THE COURT: Yes.

8 MS. POLK: Your Honor, the defense had moved
9 to enter those photographs. And so I believe they
10 have already been entered into evidence.

11 THE COURT: Okay. So it's been addressed.
12 It's moot anyway. All right. I didn't know if
13 there was anything additional on that or not.

14 Okay. Now, Ms. Polk, you had mentioned
15 other matters to address.

16 MS. POLK: Your Honor, with respect to the
17 testimony of Detective Diskin, the state had filed
18 our motion last October asking that the defense be
19 precluded from referencing the -- characterizing
20 the arrest of Mr. Ray as a "perp walk."

21 What we had noted through the interviews
22 of Detective Diskin the defense using that term to
23 describe the arrest. And that term is unnecessary.
24 It is not relevant. And the state would ask that
25 the defense be precluded from characterizing the

1 arrest in that manner.

2 The second issue that we raised in that
3 motion has to do with any reference to the bail
4 amount or the argument at the bail hearing.
5 Clearly that is irrelevant to this trial.

6 And then the third area -- we addressed
7 the third one already.

8 The fourth one is that -- precluding the
9 defense from mentioning any possible sentence if
10 Mr. Ray is convicted. That clearly is outside the
11 province of the jury.

12 So those are the three pending matters
13 from that motion.

14 THE COURT: Yeah, I think we addressed letter
15 "E" also. And it hasn't really come up as an
16 issue. And there have been a number of witnesses
17 who testified. I think -- I think these things
18 were addressed already.

19 MR. LI: Yeah. I think so, Your Honor. But I
20 mean, just -- just for the record, I don't think
21 we're going to reference Mr. Ray's arrest as a
22 "perp walk."

23 THE COURT: Okay. I'll just say right there,
24 it's ordered that that term will not be of use.

25 MR. LI: We have no intention of going into

1 the bail. And I think we put this all in writing.
 2 THE COURT: I think we did. But let's just
 3 make it clear.
 4 MR. LI: Okay. We don't have any intention to
 5 discuss the bail amount.
 6 THE COURT: Okay.
 7 MR. LI: I think we -- I think "C" we have
 8 dealt with in court and will continue
 9 to cross-examine witnesses about.
 10 And "D" we -- it is -- we will not
 11 mention a possible sentence if the defendant is
 12 convicted.
 13 And "E." I think that cat's out of the
 14 bag already. I think a lot of people have already.
 15 I think --
 16 THE COURT: Yeah. I think it's handled as a
 17 matter of relevance as the situation warrants.
 18 MR. LI: Okay.
 19 THE COURT: Ms. Polk, you had other things?
 20 MS. POLK: We have one more issue that -- I
 21 think we have two more. I'll do the -- the video
 22 the state has marked as Exhibit 815, which is a
 23 video.
 24 THE COURT: I've got it.
 25 MS. POLK: And it's the overview of

1 Angel Valley after the incident in the sweat lodge.
 2 We had captured that video. It was taken by the
 3 media. The defense had objected to it because it
 4 had a logo. I think it was "NBC," but I don't
 5 recall for sure. We have blacked that out and
 6 would like permission to proceed to use that video
 7 through Detective Diskin's testimony.
 8 THE COURT: What's the length of that?
 9 MS. POLK: It's very short, Your Honor. Just
 10 a couple of minutes.
 11 THE COURT: Okay. That's all you need is just
 12 30 seconds? Is it two minutes? Is it five
 13 minutes?
 14 MR. LI: About three minutes, Your Honor.
 15 THE COURT: Three minutes. Okay. And, again,
 16 just so we can complete the argument, I mean, it's
 17 a -- it's the scene. So there is relevance because
 18 it's the scene. And that's the point of that.
 19 MS. POLK: Yes --
 20 THE COURT: Mr. Li, I just want -- yeah. I
 21 want to make sure I have all the arguments for you
 22 to address and we don't have the -- the back and
 23 forth.
 24 Any other point about that, Ms. Polk?
 25 MS. POLK: No, Your Honor.

1 THE COURT: Okay.
 2 Mr. Li.
 3 MR. LI: It's actually not just a video of
 4 the -- and we -- first of all, we haven't seen the
 5 redacted version yet. We haven't had a chance to.
 6 There has been a lot going on.
 7 But, one, it's not just a scene -- I
 8 mean, we addressed this in writing, I think, in --
 9 early on in --
 10 THE COURT: I was trying to find that.
 11 MR. LI: We were -- we could -- we could get
 12 another copy.
 13 THE COURT: I thought it had been addressed.
 14 But it must have been as part of the --
 15 MR. LI: It was part of objections to various
 16 exhibits.
 17 THE COURT: Okay.
 18 MR. LI: So it's probably listed by that
 19 exhibit number. But the -- what it is is --
 20 actually, it's not just the sort of helicopter
 21 footage of the scene. It's actually what -- and,
 22 again, I don't know the exact source of it. It's,
 23 basically, the stories -- you know -- it looks
 24 like -- I think it's agency's news story with the
 25 sound blacked out. So you will have not just

1 some -- you will have repeated images of the same
 2 helicopter. You know. Your classic news story.
 3 So you'll see that one shot of the
 4 helicopter's -- you know -- camera capturing the
 5 scene. And then you'll see sort of almost like a
 6 PowerPoint slide of some of the scene photographs.
 7 And then you will see the same helicopter image
 8 shown again, and then you will see some more
 9 slides. So it's, basically, like a three-minute
 10 news story without the -- you know -- the
 11 voiceover.
 12 And it shows the same thing over and over
 13 again, the same clip over and over again. And it
 14 really just feels like and looks like a news story
 15 without the sound clip.
 16 It's cumulative already to the scene
 17 photos that we have. I mean, we've seen a lot of
 18 photos of sweat lodges. And this -- this has
 19 the tendency initially really exacerbated by having
 20 the ABC stamp on it to raise this whole thing into
 21 the media -- you know -- making it a big media
 22 story again, which is something, I think, we all
 23 want to reject here. And merely blurring out
 24 the sort of "ABC" logo at the bottom doesn't --
 25 doesn't address that.

1 And Your Honor, if Your Honor takes a
2 look at it --

3 THE COURT: I need to do that.

4 MR. LI: You will -- you'll see. I mean,
5 basically, it's just a clip. It looks -- it's just
6 a clip of an -- you know -- of an aerial shot, and
7 then the same aerial shot shown again, and then --
8 you know -- a few PowerPoint slides of crime scene
9 photographs that we've already introduced into
10 evidence.

11 And then -- you know -- it's like a
12 presentation. And it's not actually a piece of
13 evidence. It's an -- it's an edited clip of a lot
14 of different pieces of evidence.

15 And if Your Honor watches it, you will
16 see. The slides will move in. They will zoom in
17 on portions of the -- of the pictures that we've
18 already seen. You know what I'm talking about,
19 Your Honor. So you'll see a photograph --

20 THE COURT: I'm going -- I'm going to look at
21 it.

22 MR. LI: Okay. But you will see a photograph,
23 and then -- you know -- the camera will zoom in on
24 the photograph as if the -- as if the cameraman is
25 actually there. And he's just sort of zooming in

1 on a -- on a photograph.

2 THE COURT: Subject --

3 MR. LI: Yeah. It's just -- it's edited.
4 It's an edited clip that the TV news team has used
5 to sell their story. And I think that's entirely
6 inappropriate for this trial.

7 THE COURT: All right.

8 MR. LI: I think we have evidence.

9 THE COURT: And before I go back to Ms. Polk,
10 as I understand it, the identifiers to the network
11 or whatever is now gone.

12 MR. LI: No. It's blurred out. But it's not
13 like anyone can't figure that out. I mean,
14 Your Honor, everybody can look at it and figure out
15 that this is, basically, a news story. It looks
16 exactly like a news story. It is an edited clip
17 from a news -- it's not raw footage. It's edited
18 to tell a story, and it's edited by the media to
19 tell a story.

20 MS. POLK: Your Honor, I --

21 THE COURT: Thank you.

22 Ms. Polk.

23 MS. POLK: I would ask the defense to take a
24 look at it, because we have blacked out the
25 portion. But the reason I think it's important,

1 Your Honor, is because all we have are photographs
2 taken from different angles. This is the only view
3 we have of the sweat lodge in the area of the sweat
4 lodge where you can get an overview of it.

5 It is not cumulative in the sense that
6 any of our other photographs are being put up on
7 the overhead. And counsel is zooming in repeatedly
8 on photographs. And I don't have a problem with
9 that. But to suggest somehow that the video should
10 be kept out because it zooms in, there is just no
11 basis for that.

12 This is a very good way for the jury to
13 see the sweat lodge from above. And it's the only
14 opportunity that we have to allow the jury to see
15 this entire area at one viewing because the
16 photographs simply don't capture that view, the
17 size and the structures around it.

18 And I'll submit it to the Court when you
19 look at the video. I think you'll see what I'm
20 talking about.

21 THE COURT: Thank you.

22 MR. LI: It's a little unfair that they get to
23 argue twice and we get to argue once on some of
24 these points.

25 THE COURT: Well, if there is really something

1 new raised, then normally that's how arguments
2 work.

3 MR. LI: I understand.

4 THE COURT: If there is something that goes
5 beyond, you then -- you know -- a couple of times
6 I've allowed recross in situations in trial. So
7 I'm just trying to stop this perpetual back and
8 forth. We need to make the arguments. This has
9 been -- I guess it's been briefed at some point
10 too.

11 MR. LI: It has been.

12 THE COURT: So, Mr. Li, I'm really trying to
13 give everybody an opportunity to make sufficient
14 record. And if something has been raised that you
15 didn't address -- okay. Go ahead.

16 MR. LI: It's just there is a profound
17 difference between having a witness on the stand
18 testifying about what a particular picture shows
19 and then counsel zooming in on that particular
20 picture to help the witness explain to the jury
21 what actually is happening. That's standard trial
22 court practice.

23 It's another thing to -- for the state to
24 seek to introduce an edited clip that the media has
25 edited together to create a story. But there is an

1 editor there who's trying to make this as exciting
2 as possible so that people watch it instead of
3 turning the channel.

4 That's a very different -- there's no
5 witness. Just put it on and have all these little
6 edited clips show up. It is entirely different
7 and, frankly, prejudicial. And I'll sit down.

8 THE COURT: I think you made that point quite
9 well in your initial argument. I'm sorry.

10 This is under advisement.

11 MR. LI: Your Honor, but I did --

12 THE COURT: I want to ask one thing. Has
13 anybody used the equipment here in the courtroom
14 to -- to view it by any chance? I just want to
15 make sure that I'm going to be able to do that
16 because sometimes I get this information and then I
17 have to call AOC to try to get licensing. And it
18 just depends on what it's on.

19 MS. POLK: I don't believe we have. But when
20 we recess, we'll plug it in if we can get it. I
21 think it's locked up at the moment. But we'll plug
22 it in and make sure it works for the Court.

23 THE COURT: Thank you.

24 Okay. Mr. Hughes.

25 MR. HUGHES: Thank you, Your Honor. The final

1 issue the state would like addressed is the motion
2 we filed on March 24th regarding production from
3 the defense of civil lawsuits where Mr. Ray is a
4 party or JRI is a party. In particular we're
5 looking for the pleadings and for any discovery
6 which would contain admissions by Mr. Ray. Such as
7 request for admissions, interrogatories,
8 depositions.

9 I don't believe the defense responded to
10 the state's motion. And I would ask that the Court
11 grant it. The only issue I could see would be a
12 possible claim of self-incrimination or something
13 along those lines. We did address those issues.
14 There are several on-point cases that are addressed
15 in the state's pleading.

16 THE COURT: Mr. Li, would you like to address
17 that?

18 MR. LI: Your Honor, the reason why we didn't
19 address the lawsuit issue was because we think --
20 we thought that the Court had made a ruling, a
21 fairly clear, understandable ruling, which was,
22 essentially, that if we were going to use the
23 lawsuit as impeachment of a particular witness, we
24 could do so and we had no obligation to produce it
25 to the state.

1 However, if we were going to use the --
2 the lawsuit in a way in which we were reading from
3 passage after passage or if we were going to
4 actually try to admit it into evidence, then we
5 would have disclosure obligations. That was -- I
6 think the Court said that on the record. I think
7 we all understood that, and we've been abiding by
8 it.

9 And so to the -- to the extent that if
10 the defense was going to -- and just to be clear,
11 if the defense was going to produce or seek to
12 admit extrinsic evidence relating to these
13 lawsuits, then I think the Court's ruling was we
14 would have an obligation to produce those documents
15 to the state.

16 We did not -- we do not have an
17 obligation to produce those -- any document to the
18 state provided that we simply abide by the Court's
19 rule, which is we ask questions about the lawsuit,
20 going through impeachment in the -- in a proper
21 manner, which we -- we submit we have. And if we
22 don't -- as the Court cautioned us against -- you
23 know -- reading paragraph after paragraph of a
24 particular lawsuit.

25 We did not address this because we

1 frankly thought that the Court had already ruled
2 on what our disclosure obligations were with regard
3 to these lawsuits.

4 THE COURT: Mr. Hughes.

5 MR. HUGHES: Thank you. Your Honor, there
6 really are two issues that Mr. Li raises. One are
7 the lawsuits that have already been discussed in
8 court. The Court has not ruled that the defense
9 did not have to produce those at any time. We were
10 dealing on those particular days with how they
11 would be used with that particular witness.

12 The primary issue is Rule 15.2(g), which
13 provides for the defendant to provide discovery to
14 the state when the state makes the showing, which
15 it has made in its motion, regarding evidence that
16 could be relevant to the case that the state can't
17 otherwise obtain without undue hardship.

18 Only the defendant knows to -- which
19 parties have sued him. We know a few that we've
20 been able to figure out by looking at public
21 access. But the defendant is in the best position
22 to know how many lawsuits there are. Many of those
23 lawsuits involve now protective orders that
24 apparently were bargained for so that we cannot
25 obtain information from the plaintiff's attorney.

1 The only people we can get the discovery
2 information from, which is what 15.2(g) looks at,
3 would be the hardship issue. The only party we can
4 obtain it from is from the defendant. They're
5 relevant statements we believe.

6 And, again, the order is not asking for
7 lawsuits involving Mr. Ray ad nauseam, but it's
8 limited to issues -- lawsuits pertaining to the
9 sweat lodge incident where there may be expected to
10 be statements by the defendant that could be
11 considered incriminatory.

12 THE COURT: And, Mr. Li, I do want to hear
13 from you on that, because there was some additional
14 arguments essentially presented there. And I think
15 you --

16 MR. LI: Thank you, Your Honor. And I
17 appreciate it. And I don't want to -- I appreciate
18 the Court's indulgence.

19 First of all, I think it's been proven
20 fairly well that the state actually has very deep
21 relationships with the plaintiffs lawyers in these
22 cases. They're -- they're recommending experts to
23 use. They're providing medical documents. They're
24 doing all sorts of things.

25 So I think with respect to the

1 equal-access issue, I think we've proven to a --
2 fairly well that the -- that the state -- if they
3 want a document -- you know -- if they actually
4 want to get it, they can get it. If they don't
5 want to get the document, then they tell the
6 plaintiffs that they don't want it. So I don't
7 think that the state has made any showing. In
8 fact, I think they've shown quite the opposite
9 about the equal-access issue.

10 Secondly, it is -- it is simply not the
11 case that any of these documents are admissible for
12 any purpose. So the fact that they're seeking
13 discovery, what, eight weeks into trial about -- or
14 whatever the -- when they actually filed --

15 THE COURT: March 24.

16 MR. LI: March 24th. So I don't know exactly
17 what -- I think it was three or four weeks into
18 trial then. I'm not sure what the -- what the
19 purpose behind the discovery request is.

20 The third thing I'd say is this,
21 Your Honor: It is absolutely not the case that
22 there is any protective order that prohibits any
23 party from producing things subject to process of
24 law. It is -- every settlement out there with a
25 confidentiality agreement anywhere will say, hey.

1 This is confidential.

2 But if we're served with something or if
3 we get something then -- and the government is
4 asking for it, you got to cooperate with the
5 government. Every single settlement agreement
6 has to have that provision. Otherwise the
7 agreement would probably be illegal and maybe an
8 obstruction of justice. Every agreement has that.

9 So I think it's a misstatement perhaps
10 because Mr. Hughes hasn't had a chance to read any
11 of those -- any of those agreements. But to the
12 extent the plaintiffs' lawyers are telling anybody
13 that we can't give you anything because of a
14 settlement agreement, that's just not true.
15 It's not true, in any case, that -- you know --
16 it's properly settled.

17 The third -- the fourth thing I'd say is
18 this: We're not Mr. Ray's civil lawyers here. I
19 mean, there's -- nobody here is working on
20 Mr. Ray's civil cases relating to all of these
21 issues. I'm not saying that we couldn't ask the
22 civil lawyers to give us all sorts of things.

23 But we are not -- we're in a criminal
24 trial. And what we are doing is we're defending
25 Mr. Ray. And Mr. Hughes' suggestions on all of

1 those three scores are simply incorrect.

2 THE COURT: Mr. Hughes, your concern is with
3 particular witnesses; right?

4 MR. HUGHES: Your Honor, there's two concerns.
5 One is certainly if there is a witness who comes in
6 the future who is a party to a lawsuit. But the
7 other concern is should Mr. Ray decide to testify,
8 these pleadings would -- are likely to contain
9 statements by the defendant which he could be
10 cross-examined against.

11 And that is the other concern. Not only
12 are there witnesses who may come in the future
13 and -- but also obviously is the fact that Mr. Ray,
14 if he chooses to testify, it's appropriate to
15 cross-examine him with his own prior statements
16 should they be inconsistent.

17 THE COURT: Mr. Li, anything else on that?

18 I'm going to take it under advisement.

19 MR. LI: Yes. I mean, I guess the last point
20 Mr. Hughes made about how these lawsuits can be
21 used as statements by Mr. Ray should he choose to
22 testify seems a bit inconsistent with the various
23 positions that the state has taken about whether or
24 not a lawsuit and various documents filed in a
25 lawsuit are, in fact, statements of a particular

1 witness.

2 I think the Court -- the best way to deal
3 with this, Your Honor, is -- well, I mean, I think
4 this motion should be denied. I think before the
5 Court -- all of -- the Court has already dealt with
6 the issue as it relates to the forthcoming
7 witnesses.

8 And with respect to Mr. Ray -- you
9 know -- No. 1, I don't -- I don't think their
10 argument holds any water. It's inconsistent with
11 prior arguments it made -- the state has made.
12 They have access to all of this because they
13 clearly communicate with the plaintiffs' lawyers
14 all the time. I mean, we have no idea actually how
15 many times they've now talked to them. But every
16 time we pick at this, we find more.

17 And their position that they can take
18 documents when they want to take them and not take
19 documents when they don't want to take them just
20 does not seem to be fair, frankly, Your Honor.

21 THE COURT: Thank you.

22 That motion is under advisement. Thank
23 you.

24 Mr. Hughes, Ms. Polk, Mr. Li had some --
25 MR. LI: Yes. Your Honor, I --

1 THE COURT: -- issues. And I'd like to go
2 ahead. I mean, if --

3 MR. LI: Fine with us.

4 THE COURT: -- they're through with their --
5 we can do that.

6 MR. LI: Fine with us. The -- I just want to
7 put the Court on notice that there is probably
8 going to be -- we're going to probably file a
9 motion very soon about a late disclosure issue.
10 It's not a Brady issue. It's a motion to preclude.
11 And I believe we will do that in writing.

12 The second thing is -- you know -- with
13 respect to the 2005 incident involving Mr. P.,
14 Daniel P., I assume that the Court has considered
15 this issue. I would just submit, Your Honor, that
16 both in terms of effect, that is, Mr. P.'s medical
17 condition, was de minimis. And then the Court has
18 seen the -- the medical records in which his
19 treatment, essentially, was to get a shower. And
20 then he went back and said he had a great time.

21 But we don't have this sort of nightmare
22 scenario that the -- that the prosecution has
23 discussed. And I think the Court has already ruled
24 on that and had strong language in its 404(b)
25 ruling of February 3rd of this year in that none of

1 that would put anybody on notice that anybody was
2 dying; and, No. 2, it was not a serious medical
3 condition. There was no evidence of a serious
4 medical condition.

5 So both in terms of effect and in terms
6 of cause, we have no relevance. So the effect is
7 completely different. And in terms of cause, I
8 think this is, as I said earlier, the third or
9 fourth kiva structure back. I think there was a
10 kiva structure made in 2006. There was another one
11 made in 2007. And then there was another one made
12 in 2008, which was then used in the -- in the 2009
13 ceremony. So we are many generations of kivas
14 back.

15 And in light of the Haddow report, in
16 which there were environmental conditions that were
17 associated with the construction of the 2009 lodge,
18 none of which we have any evidence on, this is the
19 2005 lodge. We have no idea how that lodge was --
20 was actually created and put together.

21 In light of that, you don't have any
22 connection between the various lodges. And I would
23 cite the Court to a quote that -- and I don't have
24 it in front of me. But the Court -- when we were
25 discussing Fawn Foster's testimony about her prior

1 experiences -- experiences and what have you, the
2 Court had indicated that it was very important that
3 there be foundation about the similarity between
4 the lodges before any of that could overcome any
5 403 type of objection.

6 And the Court was very, very firm about
7 that, and it's in our motion for reconsideration.
8 And the Court can review it there. I'm not asking
9 you to reconsider your motion again. I mean, I
10 think our pleading stands. But you can find it
11 in -- fairly early on where, I think, you were
12 discussing with Mr. Kelly about what foundation
13 would be necessary before you would make that
14 comparison.

15 I think we've had enough information
16 about prior lodges. I think -- you know -- we've
17 made our position about our objections to that. We
18 think the 2005 lodge is so far back, has nothing to
19 do with the current issues. I think the Haddow
20 report completely changes the discussion.

21 And then the last thing is, as the Court
22 has noted, the medical records simply do not
23 support -- you know -- any finding that Mr. P.
24 suffered a serious or even -- a life-threatening or
25 even serious condition. And I would refer the

1 Court to its ruling. I mean, it's very clear.

2 THE COURT: Thank you.

3 Mr. Hughes or Ms. Polk.

4 MR. HUGHES: Your Honor, the incident
5 involving Mr. P., as I guess we'll call him today,
6 is relevant. It pertains to the conditions, again,
7 that were observed by particular people. In this
8 case we have his medical records which indicate
9 that he was unconscious. And I believe it also
10 indicates that he received an I.V. and he received
11 oxygen, which is very similar therapy to the
12 participants in 2007 or 2008 that we have records
13 in or in 2009.

14 The fact that characterizes this as
15 simply getting a shower overlooks the fact that he
16 did pass out. He was combative, which is
17 indicative of the altered mental state which we've
18 had testimony about. That is relevant to the issue
19 of causation.

20 The fact that it's a different structure
21 only highlights the fact that it is relevant.
22 Again, it goes to the pattern of what causes the
23 danger to the participants. Is it environmental
24 conditions inside the structure, or is it the way
25 the structure is being used?

1 It's the state's position that what
2 caused the deaths in 2009 was not the environmental
3 conditions or the way a structure is created per
4 se. It's the way that structure is actually used.
5 In this case it was used by Mr. Ray. So it is
6 relevant.

7 And, again, to say that -- that he had
8 only a shower overlooks the fact that he did
9 receive the medical treatment from the EMS.

10 And, again, I believe it shows how much
11 I.V. fluids he received. It also indicates
12 discharge instructions for heat exhaustion in the
13 medical records. All that information is relevant
14 to show that he suffered an illness on that
15 heat-related spectrum, which the Court has
16 previously ruled would be relevant to the causation
17 issue provided we can show that they are specific
18 signs and symptoms and that they are relevant to
19 the spectrum, which the state has shown.

20 THE COURT: Mr. Li.

21 MR. LI: Thank you, Your Honor.

22 I like -- I like this side.

23 THE COURT: All right.

24 MR. LI: Listen -- you know -- everybody who
25 goes into a sweat lodge gets hot. And everybody

1 who goes into a sweat lodge is somewhere on that
2 spectrum. And everybody who goes into a sweat
3 lodge -- or many people who go into a sweat lodge
4 experience visions, have all kinds of experiences.

5 And you just -- that is -- and, again,
6 I'm not an expert in this. And I defer to a lot of
7 other folks who have done sweat lodges who -- who
8 are more in tune with all of this. But every
9 single person who goes into a sweat lodge has -- is
10 somewhere on that continuum.

11 And so the fact that Mr. P. was acting
12 strange -- and there are a lot of different reasons
13 for it, a lot of different reasons. A lot of the
14 folks -- with all due respect for the people who
15 come in here and testify, a lot of the folks who go
16 to these seminars have -- you know -- ideas about
17 out-of-body experiences and -- you know -- altered
18 states and visions and what have you.

19 And from his perspective, which he has
20 articulated to Detective Diskin so -- you know --
21 it's not like they're trying to put Daniel P. on
22 the stand to have him sort of explain what he was
23 actually experiencing. But they actually want to
24 have somebody who watched him and sort of explain
25 what -- what he was experiencing and what have you.

1 But what he actually explained to
2 Detective Diskin is that he was having this
3 experience and he didn't want to come back. And it
4 was joyful and blissful and all of these sorts of
5 things. There are a lot of people who do these
6 kinds of things who meditate and have these sorts
7 of experiences where they feel joyful and in a --
8 in a different place. And that's what they're
9 after.

10 But the idea that somehow because a guy
11 went into a sweat lodge and then he came back -- he
12 came out and he was acting weird means that he was
13 on the continuum to death -- okay? -- and therefore
14 under 404(3) we don't care about the possible
15 prejudice of having some lay witness just sort of
16 describing whatever she thinks of what this
17 guy's -- you know -- actual conditions were, that
18 the prejudice is outweighed by the probative value
19 under 404(3) is just -- it's not correct,
20 Your Honor.

21 And we submit that we've heard a lot of
22 testimony already which was supposed to be for an
23 extraordinarily limited purpose about prior sweat
24 lodges. And I -- I believe deeply, Your Honor,
25 that this is quite cumulative and of

1 extraordinarily small probative value.

2 THE COURT: Thank you. With regard to the
3 motion to reconsider in 404(b) that was filed a
4 week ago -- fairly recently --

5 MR. LI: Yes --

6 THE COURT: I --

7 MR. LI: -- probably about a week and a half
8 ago.

9 THE COURT: Normally in the criminal justice
10 system, the civil rule is adopted with regard to
11 motions to reconsider, and a party doesn't respond
12 unless ordered. And that's the practice I
13 generally follow. A lot of times in the -- in the
14 criminal justice system, the attorneys are just
15 used to responding to things that they do even
16 though it hasn't been ordered.

17 But I don't -- Mr. Hughes or Ms. Polk, I
18 don't know that you responded to that, but I did
19 not order you to respond either.

20 Do you know?

21 MS. POLK: Your Honor, we have not. I believe
22 our time is still running. If the Court -- if
23 you're indicating you don't need a response from
24 the state, we would --

25 THE COURT: No. I'm going to indicate the

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1 contrary, that I would order a response because I
2 did think in light of the Haddow disclosure, I'm
3 going to be looking at that. And I'm -- and I'm
4 asking the state to -- I'm directing that the state
5 respond because I'm going to probably do something
6 with that. And if you -- you need to respond if
7 you want me to consider anything.

8 Well, since I'm ordering it now, I would
9 like that soon. It appears you were regarding it
10 as something you were going to respond to.

11 When can you have a response.

12 MS. POLK: I believe we had calculated our
13 time was next -- our 10 days would be next
14 Wednesday.

15 THE COURT: And that will be the time.

16 MS. POLK: Okay.

17 MR. HUGHES: Your Honor, on that issue, if
18 the motion didn't bring up the Haddow issues,
19 if the Court would like us to respond to the Haddow
20 issues, we would request that the defense provide
21 something to us to indicate how they believe the
22 Haddow issue pertains to this so that we can
23 appropriately respond to that.

24 THE COURT: And that's -- that's reasonable.
25 And I think there's -- some of the issues remain

1 the same.

2 But, Mr. Li, can you supplement? And
3 what can happen, then, is you can reply to what the
4 state says.

5 But how would you articulate --

6 MR. LI: I guess -- I guess there's two points
7 that I would make. Why don't we just make a
8 simultaneous briefing so we can just get it all out
9 of the way. Otherwise, we're going to be bumping
10 several -- several stages down the road. And --
11 and, Your Honor, if we follow the regular briefing
12 schedule, given the Court's admonition to the state
13 that they keep their case in the next two to three
14 weeks, we start to get to the very end.

15 THE COURT: Well, we've had a break that was
16 not anticipated either. But no. No. I see what
17 you're saying. In terms of time, I understand, but
18 I --

19 MR. LI: In terms of time --

20 THE COURT: But I indicated that. Well,
21 everybody knows what the -- generally the issue
22 with Haddow. And simultaneous briefing by?

23 MR. LI: Wednesday.

24 THE COURT: Wednesday.

25 MR. HUGHES: And, Your Honor, again, with

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1 the -- on the issue of simultaneous briefing, quite
2 honestly, we're not sure how that issue changes
3 the 404 issue. And that's where we were -- if the
4 defense can provide something prior to the time our
5 response is due, then we can provide a more
6 intelligible response.

7 Because as we are here right now, I'm not
8 sure how the defense views the Haddow information
9 as changing the 404 issue. And for those reasons,
10 Your Honor, I would ask that we have time to
11 respond to some sort of supplemental brief by the
12 defense.

13 MR. LI: I --

14 THE COURT: Go ahead.

15 MR. LI: Your Honor, I just --

16 THE COURT: Go ahead.

17 MR. LI: I think it's up to the state to
18 figure out its own case. And they -- I mean,
19 the gorilla that's in this room is the fact that
20 they late disclosed Brady. And it really is
21 pushing quite hard to ask the defense to help the
22 state understand why their Brady violation and how
23 it might affect a 404(b) ruling that this Court
24 made on some other -- strike that -- not a 404(b)
25 ruling, but a causation ruling that this Court made

1 a few weeks ago.

2 I think it's up to the parties. If the
3 state -- they have very smart and capable lawyers.
4 They can figure out whatever they think their
5 arguments are. We are perfectly willing to
6 supplement what the -- we're perfectly willing to
7 supplement our -- our brief.

8 But I think let's just get it done.
9 Let's do it -- we'll do it whatever day the Court
10 wants. Wednesday. Let's get it done, put it in
11 front of the Court. I think the Court already has
12 some idea.

13 THE COURT: You know, we're in trial, and just
14 try to look at normal response times. That's
15 really contemplated for pretrial when you're months
16 ahead of time.

17 What I'm going to do is -- there's --
18 there's enough to respond to in the motion to
19 reconsider as it stands.

20 Mr. Hughes, you can do that. If you want
21 to go ahead and add your thoughts, you can do that.
22 File what you wish. And I'm going to consider it
23 because we're in trial and we need to focus on the
24 issues now.

25 MR. LI: Thank you, Your Honor.

1 THE COURT: And then Mr. Hughes or Ms. Polk,
2 there -- oh. I'm sorry.

3 I want to know the rest of the issues
4 from defense.

5 MR. LI: I think the Court dealt with most of
6 them. I mean, one was just sort of asking the
7 state to instruct their witness or to help their
8 witness not wander off topic into areas relating
9 to, for instance -- you know -- the settlement
10 issues under 408(a).

11 I think the Court wasn't going to make
12 any order or anything like that. But obviously we
13 would expect that the state would not seek to -- or
14 would instruct their witnesses not to elicit -- you
15 know -- impermissible evidence.

16 THE COURT: And they agreed to do that.

17 MR. LI: They agreed to do that. So I just
18 wanted to say that. And then --

19 THE COURT: The 9-1-1 with Ms. Hamilton. I
20 think you brought that up.

21 MR. LI: Right. And, again, with respect to
22 the 9-1-1 call, we would submit that it's
23 irrelevant. This is the 2005 incident. We'd
24 submit that it's irrelevant for a number of
25 reasons. Principally that in 2009 there was

1 absolutely no delay whatsoever when they decided
2 they wanted to call 9-1-1. So it's not actually
3 admissible for any purpose at all because both
4 Debbie Mercer and Ms. Hamilton, the moment they saw
5 there was a problem, ran in to call 9-1-1.

6 I think Ms. Hamilton and I think Debbie
7 Mercer both said something to the effect of --
8 well, I think Ms. Hamilton said she didn't even
9 talk to Mr. Ray. She just did it. And -- you
10 know -- good. I'm glad she did that.

11 But -- so the idea that there is some
12 relevance to what happened in 2005 about Mr. P. and
13 9-1-1 and all that, it is certainly is far more
14 prejudicial than probative. There is -- there is
15 actually zero relevance. It didn't impact
16 anybody's behavior in 2009. And it has a tendency
17 to -- you know -- make some sort of 403 kind of
18 prejudicial assumptions about Mr. Ray and would
19 require, essentially, a minitrial about Mr. P. to
20 see whether it was a condition that required 9-1-1
21 to be called and all of those sorts of things. And
22 ultimately Mr. Ray and Ms. Hamilton actually made
23 up at the end of the day where Mr. Ray said, hey,
24 sorry. And -- you know -- game over.

25 So we have this whole thing where there

1 is literally almost -- there is literally no
2 relevance because it had no impact on 2009, the
3 manslaughter trial that we're now in. And the
4 prejudicial effect is to suggest some sort of
5 callus trait or something like that on the part of
6 Mr. Ray, which is, frankly, far more prejudicial
7 than probative in the 403.

8 THE COURT: And, Ms. Polk, I think you were
9 doing the direct of Ms. Martin when the issue came
10 up.

11 MS. POLK: Yes. And there's two issues
12 really. One is that that was a door that was
13 opened through the cross-examination of Ms. Martin.
14 The state at that time was not allowed to explain
15 the -- why Ms. Martin would be asking can she call
16 9-1-1.

17 But the second issue is that the
18 information surrounding 2005 and Amayra Hamilton
19 calling 9-1-1 is relevant to the issue of heat.
20 Because in 2005 nobody was calling 9-1-1 for Daniel
21 Pfankuch. Mr. Ray had gone to his room.
22 Ms. Hamilton called 9-1-1 and later was approached
23 by Mr. Ray who was very, very angry that she had
24 called 9-1-1. And there was several witnesses to
25 that, including Ms. Hamilton, who will testify how

1 angry he -- the defendant was at Ms. Hamilton for
2 calling 9-1-1.

3 As a result of that, though, there was a
4 meeting between Ms. Hamilton and the defendant
5 where the defendant -- where Ms. Hamilton said,
6 this will never happen again. And Mr. Ray agreed.
7 The next year, then, there are no incidents with
8 respect to his ceremony because he ratchets down
9 the heat but then starts complaining again that the
10 sweat lodge was not hot enough and so wants it
11 hotter.

12 2007 makes it hotter, and then 2008
13 and 2009 the Court has heard about. So this issue
14 of the 9-1-1 call comes up through both of those
15 contexts. One is the opening of the door through
16 the testimony of Melinda Martin but also to put
17 into context the causation issue of heat.

18 And, Your Honor, I -- on the issue of
19 408(a), I'm not sure if I heard Mr. Li represent to
20 the Court that the state agreed. That happened
21 really fast, and I --

22 MR. LI: I did not.

23 MS. POLK: We jumped over the issue, and I --
24 does the -- does the Court want the state to
25 address it?

1 THE COURT: Yes.

2 MS. POLK: I don't know what happened with
3 that issue. But all of a sudden we were talking
4 about 9-1-1.

5 THE COURT: Well, okay.

6 MR. LI: Then I -- then if we really need to
7 address the issue of whether or not a settlement is
8 admissible under 408(a) of the Arizona Code of
9 Evidence, I think I'm happy to do it. It is
10 explicitly not relevant to -- and not admissible,
11 explicitly not admissible.

12 I think the state has previously
13 proffered twice to this Court that a settlement is
14 relevant to establish liability. I think the state
15 has said that twice. That is explicitly not true
16 under Rule 408(a).

17 Secondly, this new argument that I think
18 the state is proffering, which is that a settlement
19 is admissible to show lack of bias, I think, has
20 two fairly fundamental problems. One is the
21 problem that the Court already pointed out earlier
22 in a discussion about 408 where the Court said, I
23 don't really understand that. If you settled, you
24 have -- you're no longer -- you no longer have any
25 responsibility to tell the truth? And is that the

1 assumption that we're making in -- in our -- in our
2 system here? And I don't think the rules of
3 evidence provide for that.

4 But more importantly, Your Honor, if
5 that's the rule, that any time somebody settles,
6 the only -- the way you can get around the
7 prohibition of 408(a) is all you have to do is say,
8 well -- you know -- that shows absence of bias,
9 absence of bias.

10 Okay. Then that rule swallows the whole.
11 Or that rule swallows the whole. The exception
12 swallows the whole. Because literally every
13 witness has a -- has a credibility issue. Every
14 single witness. The other side wants to say, well,
15 they have a credibility issue. But every single
16 time somebody who is on the stand has entered into
17 a settlement agreement of any kind, then all you
18 got to do is say, well, it goes to the bias or lack
19 of bias. And then you just go right around the
20 rule that way.

21 More importantly, this is Ms. Hamilton
22 talking about lawsuits involving JRI. There is a
23 foundation issue there as well. You know, she's --
24 she's not -- you know -- anything she knows is
25 hearsay. So there is a deep foundation issue.

1 There is an explicit rule of evidence that
2 prohibits the discussion of settlement agreements
3 to establish liability, which the state has said is
4 their -- was their intention twice.

5 And then, thirdly, this idea that you can
6 simply end run Rule 408 by simply saying, oh,
7 well -- you know -- it shows lack of bias, that
8 would -- that would absolutely -- yeah. I mean --
9 you know -- we've thrown -- we've talked about
10 mistrials a lot just recently. But to mention
11 settlement in this context would -- you know --
12 would raise that spectre once again.

13 And the idea that the state wants to
14 skirt close to that line to me, Your Honor, seems
15 quite reckless, seems quite -- quite dangerous to
16 just skirt right up to that line where there is
17 literally no precedent for this idea.

18 The second point I'd make is just that
19 this should also apply to Mr. Hamilton because he's
20 part of this process as well.

21 THE COURT: Mr. Hughes.

22 MR. HUGHES: Your Honor, 408(b) does set forth
23 the number of permitted rules. And one of the
24 rules -- one of the permitted uses for a settlement
25 is exploring the bias issue. It would be improper

1 to suggest that a witness is biased because of a
2 lawsuit particularly if that lawsuit is over and
3 done.

4 We had testimony a few weeks ago from a
5 witness who had a lawsuit that was still pending.
6 And there is a clause in the lawsuit that made it
7 appear that the witness had something to gain
8 depending on whether Mr. Ray was convicted or not.
9 It could influence or help that witness's civil
10 lawsuit. To show that the lawsuit is over and done
11 shows that that witness at least for the bias issue
12 no longer has a bias for how -- what happens in
13 this criminal case because my civil case is all
14 said and done.

15 And for that reason -- for that very
16 limited reason, information that that lawsuit is
17 over and done and completed is appropriate under
18 the 408(b) analysis.

19 MR. LI: Your Honor, I think that would be a
20 reckless application of the rule. It literally
21 would permit any -- any witness to testify about
22 any settlement and leave the jury wondering whether
23 that's admission of liability.

24 Rule 408(a) is -- is written so strictly
25 because for precisely the reason that our system

1 encourages people to settle and not have adverse
2 consequences out of that and not have anybody
3 create an unfair idea that that's somehow an
4 admission of liability.

5 It is not appropriate at all to
6 testify -- for a witness to get up there and
7 testify about their settlement.

8 THE COURT: Mr. Hughes, do you have anything
9 else on that?

10 MR. HUGHES: No, Your Honor.

11 THE COURT: And that should have a written
12 ruling. And it's under advisement.

13 Then we were talking about and I took us
14 into the 9-1-1 aspect of that.

15 MR. KELLY: Judge, addressing just a limited
16 portion of Ms. Polk's argument, as it relates to
17 Melinda Martin, the remainder will be addressed by
18 Mr. Li. But I was the attorney cross-examining
19 Ms. Martin. And I believe the record speaks for
20 itself. We held a sidebar conference. We reviewed
21 the question and the answer.

22 You made a determination at that time
23 that -- you did not, my recollection, make a
24 determination that the door had been opened. I had
25 argued that it was inadvertent and it was not

1 intentional. And regardless you made a specific
2 finding that 403 precluded any additional reference
3 in that regard.

4 I would submit, Judge, that's the law of
5 the case that should be applied as to the first
6 part of Ms. Polk's argument.

7 She had a second portion in regards to
8 relevance in -- back in 2005 with Daniel P. And
9 I'll allow Mr. Li to address that.

10 THE COURT: Well, I want to stay on that
11 specific point, because that ruling had to do with
12 Ms. Martin. And I looked at two specific factors.
13 Time. Mr. Li mentioned this. It's sometime ago.
14 And I called it the apology or something like that.
15 You phrased it in some -- in some other fashion
16 other than how this other witness years later was
17 going to somehow be affected. There's -- I guess
18 there's some possibility of that.

19 But for 403 purposes -- I'm sorry. Under
20 403 it wasn't appropriate for it to come in with
21 regard to Melinda Martin.

22 So, Mr. Kelly, I need to make clear that
23 that was not the general rule of the case. It had
24 to do with a 403 finding with regard to Melinda
25 Martin.

1 MR. KELLY: I agree, Judge. And when I say
2 "rule of the case," I meant the rule of the case as
3 it applied to Ms. Martin.

4 THE COURT: Okay. Exactly. It applied to a
5 specific witness. And those are two -- the 403
6 factors that were going through my mind at the
7 time.

8 MR. KELLY: I submit at this time it's now --
9 the state is not permitted to reopening or urging a
10 reconsideration of that ruling.

11 Again, as to the second more detailed
12 argument from the State of Arizona, I'd defer to
13 Mr. Li.

14 THE COURT: Well, I'm just saying that
15 Ms. Martin has testified and I've ruled. And we're
16 looking at future witnesses now.

17 Mr. Li.

18 MR. LI: Your Honor, the narrative that
19 Ms. Polk gave about how the calling of 9-1-1 is
20 somehow relevant to causation, I'm -- I'm not
21 seeing the logic behind that. What I did hear was
22 a recitation of facts that, again, is the same
23 recitation of facts that we hear when we're talking
24 about the pattern, which -- you know -- as the
25 Court is well aware, I believe, is, essentially, a

1 plea toward propensity evidence, which is
2 prohibited by 404(b).

3 But, essentially, the state is, again,
4 saying that the -- the relevance of 9-1-1 for
5 causation somehow is because this pattern over
6 2000 -- from 2005, 2007, 2008 somehow led to 2009
7 as a matter of causation. And I think that fails
8 just as a matter of logic.

9 There is no relevance, no causal effect,
10 relating to whether 9-1-1 gets called one way or
11 the other in 2005. Because what happens in 2009 is
12 they call 9-1-1 right away. They don't consult
13 with anybody. They call 9-1-1 right away.

14 I would also beg to differ with
15 Ms. Polk's recitation of what the facts actually
16 are as they -- as they relate to the temperatures
17 inside the sweat lodge.

18 The only testimony that we've had at all
19 about the sweat lodge is from Mr. Mercer about the
20 temperatures between the various sweat lodges. And
21 he said it was, in fact, not hotter between 2008
22 and 2009. He said that on tape to Detective Diskin
23 and to others. He said it on the stand, and he
24 also said additionally on the stand that he no idea
25 what temperature any of the particular sweat lodges

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1 were at any particular time.

2 He had no idea because he didn't go
3 inside. And so that he would just be guessing as
4 to -- and I think the Court recalls this testimony.
5 He would just be guessing as to what the
6 temperature was in 2009, 2008, 2007, any sweat
7 lodge that he was dealing with with respect --
8 because he never went inside.

9 And so the only arguments that the state
10 has created for the admissibility of this 9-1-1
11 apology or whatever you want to call it, this 9-1-1
12 thing in 19- -- or in 2005 is this rickety idea
13 that somehow a 9-1-1 call in 2005 somehow relates
14 to causation in 2009. And there is no causal link.
15 There is no logical link at all, and there is no
16 legal link, Your Honor.

17 So -- yeah. And, as Ms. Do points out to
18 me, really what we're talking about is either
19 pattern evidence, which is prohibited by
20 Rule 404(b), or we're talking about knowledge,
21 which is also prohibited by this Court's ruling in
22 2000 -- on February 3rd, 2000 -- this year.

23 There is no -- only the very narrow
24 ruling that the Court made was about can you talk
25 about prior sweat lodges to show somehow a causal

1 issue? And 9-1-1 calls have nothing to do with
2 that.

3 THE COURT: Okay. And, Ms. Polk, I want to
4 return to you. But I understand what Mr. Kelly's
5 point is. And I want you to address that. It is
6 that -- I think it is that that didn't -- testimony
7 of that witness did not somehow operate as an open
8 the door for any other possible witness.

9 I think, Mr. Kelly, that's what you're
10 saying.

11 MR. KELLY: Yes.

12 THE COURT: Okay.

13 MR. KELLY: Thank you.

14 THE COURT: And so I'd like you to -- you
15 know -- address that if you're suggesting somehow
16 it did -- you know.

17 MS. POLK: Your Honor, my recollection of the
18 sidebar when Ms. Martin was testifying was that at
19 that point the Court had ruled that on the issue of
20 causation, the information concerning prior sweat
21 lodge ceremonies conducted by Mr. Ray would come
22 in. But that was conditioned upon the state making
23 that showing the -- providing the medical evidence
24 to the Court about that continuum of heat-related
25 illnesses.

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1 When Ms. Martin testified, the doctors
2 had not yet testified, and we had not yet made that
3 showing. My understanding at the sidebar was that
4 that was another factor the Court considered was
5 to -- that suddenly through this witness, then the
6 jurors would start to hear about a 2005 incident,
7 and yet the state had not yet provided the medical
8 information to the Court.

9 THE COURT: Okay. Anything else on this
10 point?

11 MS. POLK: Your Honor, yes. Just -- just
12 briefly. I understand it's late and everybody --

13 THE COURT: I think people wanted to complete
14 this rather than come back.

15 MS. POLK: Okay. What this case is about is
16 the defendant's conduct with relation -- with using
17 heat in a reckless way. The issue of causation has
18 come before the Court and has come before the jury
19 because the defense is challenging that it is heat
20 that caused the deaths of the three victims.

21 And so what this case is about is the
22 defendant's conduct in using heat in such a way
23 that he recklessly causes the deaths. And it's
24 under that idea that what -- how the defendant has
25 used heat in the past is relevant because the

1 defense has challenged suggesting that it's poison.

2 I think what I hear from yesterday's
3 hearing is that now the defense is going to suggest
4 that carbon dioxide caused the deaths. And
5 evidence, then, that goes to this issue of
6 causation that helps the jury understand or
7 conclude that it is heat that is the cause of the
8 deaths becomes relevant. And that's why the
9 defendant's behavior in 2005, his use of heat in
10 2005 through 2009 is relevant.

11 The issue of the 9-1-1 call comes up in
12 2005 because the defendant has used heat to try to
13 achieve this altered state for his participants,
14 and in doing so renders one of his participants,
15 Daniel Pfankuch, unconscious. When Amayra Hamilton
16 sees that situation, she makes the decision to call
17 9-1-1. And then there is a confrontation
18 afterwards when Mr. Ray is very angry that Amayra
19 has interfered and called 9-1-1.

20 And then later there is a second meeting
21 between the two where Amayra Hamilton says, this
22 will not ever happen again, and Mr. Ray
23 acknowledges that. And yet he, then -- he tones --
24 the heat in his sweat lodge ceremony -- he tones it
25 down for 2006 but then is unhappy and wants to use

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1 heat again to achieve this altered state for his
2 participants.

3 And that's where, then, in 2007 the jury
4 has heard that people get sick. 2008 people are
5 sick. And in 2009 people finally pass away.
6 That's the context of the 9-1-1 call from 2005 is
7 that it's Ms. Hamilton who sees somebody stricken,
8 calls 9-1-1, and then the context of what happens
9 afterwards with Mr. -- the meeting with between the
10 parties where Ms. Hamilton says, this will not
11 happen again.

12 And consequently, 2006 then people don't
13 get sick. But then Mr. Ray, the defendant, is
14 unhappy because it didn't get hot enough because
15 the people didn't achieve this altered state that
16 they're paying for. And so he ratchets up the heat
17 again.

18 What the case is about is the defendant's
19 conduct using heat as this tool to achieve this
20 altered state for his participants and in that
21 process killing the three victims.

22 MR. LI: Your Honor, I believe it was my
23 motion.

24 THE COURT: It is. And I was going to ask for
25 your remarks.

1 MR. LI: Your Honor, the -- the state's
2 recitation -- every time the state makes this
3 recitation of why some particular prior event was
4 relevant, we slip right into pattern evidence,
5 which is forbidden under 404(b). And we slip right
6 into knowledge, which is forbidden by this Court's
7 ruling on February 3rd, 2011.

8 I think the state's understanding of what
9 "causation" means is quite different from what the
10 Court's understanding of what "causation" means. I
11 think the state's understanding of causation is
12 just that, oh, well, that just means that we get to
13 argue our theory again about, oh, well, he
14 ratcheted up the heat, even though we have a guy
15 who says he has no idea what the temperature is and
16 even though he said on tape to Detective Diskin
17 that actually 2008 -- 2009 wasn't hotter than 2008,
18 and actually he used fewer rocks in 2009 than 2008.

19 There is a difference. What the Court is
20 describing, I think, is physical causation, what
21 physically caused these folks to pass away. What
22 the state is arguing is some general sense --
23 basically, their theory -- basically, their entire
24 404(b) theory, which is that -- you know -- James
25 Ray is an agent of criminal recklessness. That

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1 means just, basically, that Mr. Ray over and over,
2 what he -- because of who he is and the way he does
3 things, he's an agent of criminal recklessness.
4 That is prohibited under 404(b).

5 I think what -- the Court's understanding
6 is far more narrow and has to do with very specific
7 issues as to physical causation. Did somebody die
8 of heat stroke or did they die of some toxin? One
9 critical, critical, critical point we need to make,
10 Your Honor, and why I urge so hard for the burden
11 of proof instruction relating to superseding,
12 intervening cause -- you know -- causation --
13 causation instruction rule --

14 THE COURT: I recall your request for that
15 one --

16 MR. LI: Yeah. Instruction 203. One of
17 the -- one of the reasons why that's so critical is
18 because the state has the burden of proving what
19 caused these folks to die beyond a reasonable
20 doubt. And they also have the burden of proving
21 that something else didn't cause them to die.

22 It has never been the defense's burden to
23 prove that -- to prove that something else caused
24 folks to die. My opening statement, every question
25 that we've done here with Ms. Do and the medical

1 examiners, everything that we've done here is to
2 suggest that there are possible other causes of
3 death.

4 In fact, there are many indicia that
5 there may have been other causes of death. And we
6 have explored those questions with the medical
7 examiners and with other witnesses to demonstrate
8 that you know what, there were many indicia of
9 other causes of death that the state ignored, just
10 like they ignored the Haddow report.

11 It's not our burden. And we're not
12 saying we know what caused -- you know -- people to
13 die. If they had tested for organophosphates
14 within 36 hours or so of the -- of the decedents --
15 you know -- arriving at the hospital, they might
16 actually have an answer. If they had looked at all
17 of the documents that said toxins and -- and looked
18 at all the symptoms and provided accurate
19 information to the doctors about this risk of
20 organophosphates that -- and an EMT suggested that
21 there was this risk. If they had done that, then
22 maybe we would know. But they didn't.

23 And that has always been our argument.
24 Our argument -- we have never assumed the burden,
25 and we don't have a burden. The state had a burden

1 to not only Mr. Ray, but to the victims, to
2 determine exactly what happened. And they -- and
3 they flubbed it, Your Honor.

4 And the point that we're making through
5 all of our cross-examination in all of our
6 arguments is that the state cannot and does not
7 carry its burden that there is not a superseding,
8 intervening cause.

9 And it's critical because the state keeps
10 on saying all of -- now the defense is arguing
11 something else.

12 You know, it's not that we're arguing
13 something else. We're arguing that there may have
14 been another cause of death that the state ignored
15 and that there are a lot of symptoms consistent
16 with other causes of death that they should have
17 paid attention to.

18 And I think it's critical that as we've
19 gone through all this testimony and the state
20 has -- has done its thing about -- you know -- in
21 our view, Your Honor, suggesting a pattern, all of
22 these kinds of things, which we, frankly, believe
23 is impermissible -- I think it's critical that we
24 instruct this jury on what the law actually is.
25 I'm not asking for something that's not provided

1 for in the law.

2 You know, we're asking for something very
3 pinpoint that's exactly what the law is. We're
4 asking for the -- the jury to be made aware of this
5 Court's various rulings that relate to this exact
6 evidence. And we're asking that they understand
7 what the rules of the road are as they consider all
8 of this evidence, because we do not actually have a
9 burden.

10 Thank you, Your Honor.

11 THE COURT: This is a little bit beyond --

12 MR. LI: I understand.

13 THE COURT: -- strictly speaking, the
14 Daniel P. and 9-1-1 question, which I will make a
15 separate ruling on that. However, it relates to
16 the whole 404(b) matter as it's -- as it's been
17 described, relates to the level of charging also --
18 that question that's been brought up in several
19 contexts.

20 Any other issues?

21 MR. LI: Not from -- not from the defense,
22 Your Honor.

23 THE COURT: Ms. Polk?

24 MS. POLK: No, Your Honor. Thank you.

25 THE COURT: Then we will recess. I do want --

1 and I'm going to direct the parties keep me
2 apprised of the discovery steps that are being
3 taken with regard to the expert.

4 Thank you.

5 MR. LI: Thank you, Your Honor.

6 (The proceedings concluded.)
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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss. REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 24th day of April, 2011.

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MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335

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1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)

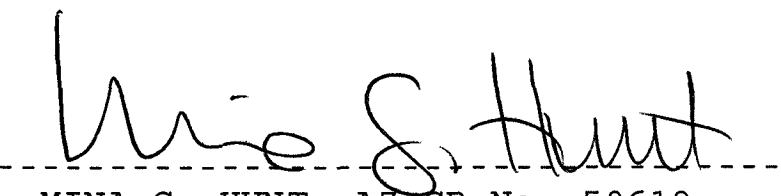
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